SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 241

NATIONAL BELLAS HESS, INCORPORATED,
APPELLANT,

vs.

DEPARTMENT OF REVENUE OF THE
STATE OF ILLINOIS, ETC.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

INDEX

	Original	Print
Record from the Circuit Court of Cook County, State of Illinois		
Complaint	2	1
Verification	5	3
Exhibit—Final assessment of Use Tax	6	5
Exhibit—Certificate to foregoing final assessment	7	7
Exhibit—Certificate to foregoing final assessment	8	8
Exhibit—Letter dated June 26, 1963 from Department of Revenue to Secretary of State	9	9
Exhibit—Affidavit of Frances Seipel	10	10
Affidavit of service and alias summons and returns	33	11
Special Appearance and motion to set aside and quash service of alias summons, etc.	42	18
Affidavit of Aaron Maer	59	31
Affidavit of Herman A. Benjamin	63	35

RECORD PRESS, PRINTERS, NEW YORK, N. Y., NOVEMBER 28, 1966

	Original	Print
Record from the Circuit Court of Cook County, State of Illinois—Continued		
Order denying motion to quash service	65	37
Motion to strike or dismiss complaint	69	38
Order denying motion to strike or dismiss	89	53
Answer to complaint	90	54
Motion of plaintiff for summary judgment, etc.	111	64
Affidavit of Harry L. Hulman	112	65
Affidavit of William G. Clark	115	66
Affidavit of George Marks of merits in opposition to motion for summary judgment	186	68
Affidavit of William O. Campbell of merits in opposition to motion for summary judgment	192	73
Order and judgment	196	75
Notice of appeal to Supreme Court of Illinois	199	77
Proceedings in the Supreme Court of Illinois	428	86
Opinion, House, J.	428	86
Order of affirmance	439	100
Notice of appeal to Supreme Court of the United States	456	101
Clerk's certificate (omitted in printing)	467	106
Order noting probable jurisdiction	468	106

[fol. 2]

IN THE CIRCUIT COURT OF COOK COUNTY

At Law

No. 63021015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

—vs.—

NATIONAL BELLAS HESS, INCORPORATED, a corporation, Defendant.

COMPLAINT—Filed October 15, 1963

Department of Revenue of the State of Illinois, for the use of the People of the State of Illinois, as the plaintiff herein, by Harry L. Hulman, its acting Director, by William G. Clark, Attorney General of Illinois, its attorney, Says That

(1) on or after August 1, A.D., 1955, and before the filing of this Complaint, the defendant National Bellas Hess, Incorporated, was engaged in soliciting orders within the State of Illinois from users by means of catalogues or other advertising, as a retailer of tangible personal property;

(2) in accordance with Chapter 120—Revenue, Section 439:2 of the Use Tax Act, as amended, of the Illinois Revised Statutes—in relation to a tax upon the privilege of using tangible personal property in the State of Illinois, it was the duty of the said defendant to pay the tax to the plaintiff, at the rate and in the amount provided by statute.

(3) that although the defendant corporation is incorporated in another state and has its principal place of business outside the State of Illinois, the defendant was issued a certificate of Registration, number 953 777 by the Department of Revenue of the State of Illinois as provided by law.

[fol. 3] (4) in accordance with the provisions of Section 3 of the said Use Tax Act, it was the duty of the defendant to file a return with the plaintiff for each month the defendant was engaged in the said business, showing among other things the total amount of gross sales of all tangible personal property made at retail by the defendant within the State of Illinois during each preceding calendar month and the amount of tax due thereon to the plaintiff, and to pay said tax to the plaintiff.

(5) in accordance with the Use Tax Act plaintiff did determine the amount of tax due from the defendant to the plaintiff for certain months according to its best judgment and information for which months no returns were filed by the defendant with the plaintiff and the latter did thereupon notify the defendant on the 21st day of January, A.D., 1963, by United States registered mail addressed to the defendant at, 715 Armour Road, North Kansas City, Missouri, last known address, and a copy to the Secretary of State of the State of Illinois, of the amount due upon the returns as corrected and of the amount of the delinquency computed for months wherein no returns were made, stating that it proposed to assess such amount, with penalties, in the sum of Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18), photostatic copies of which proposed assessment and the certificate of mailing are attached hereto and marked plaintiff's Exhibits and made a part hereof;

(6) the defendant did not file a protest to said proposed assessment and did not request a hearing thereon within twenty (20) days after said notice of proposed assessment and thereupon the plaintiff made a final assessment of the amount of tax and penalties proposed against the defendant in the sum of Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18);

(7) on the 26th day of June, A.D., 1963, plaintiff mailed to the defendant by United States registered mail addressed to the defendant at, 715 Armour Road, North Kansas City,

Missouri, last known address, notice of said final assessment, photostatic copies of said notice of final assessment [fol. 4] and the certificate of mailing being attached hereto, and a copy to the Secretary of State of the State of Illinois, and made a part hereof, marked plaintiff's Exhibits.

(8) the said defendant has not paid any sum on account.

Wherefore, the plaintiff asks for judgment against the said defendant in the sum of Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18).

William G. Clark, Attorney General of the State of Illinois.

[fol. 5]

VERIFICATION

State of Illinois,
County of Cook, ss

Harry L. Hulman, being first duly sworn, upon his oath deposes and says that

(1) he is of lawful age, and resides in Springfield, in the County of Sangamon, State of Illinois, and is the Director of the Department of Revenue of the State of Illinois;

(2) as such Director of the Department of Revenue of the State of Illinois, he is authorized to, and now does, make this affidavit for and in behalf of the said Department of Revenue, the plaintiff in the above and foregoing complaint; and that he has full knowledge of the facts relating to the claim of the said plaintiff, as set forth in the foregoing complaint;

(3) the matters and things in the said complaint set forth are true, in substance and in fact; and that there is due and owing to said plaintiff from the defendant, after allowing all just deductions and set-offs, the total sum of

Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18); and that

(4) he hereby certifies that the photostatic copies attached hereto and described in said complaint as exhibits thereto and a part of said complaint, are true and correct photostatic copies of records of the Department of Revenue in his custody as such official head of said last-mentioned Department by virtue of the provisions of the Civil Administrative Code of Illinois.

Harry L. Hulman, Deponent.

Subscribed and sworn to before me this 11th day of October A.D. 1963.

Mildred Harris, Notary Public, my commission expires: 8-21-65.

[fol. 6]

EXHIBIT TO COMPLAINT

Series E—ROT No. 1736

STATE OF ILLINOIS
DEPARTMENT OF REVENUE
RETAILERS' OCCUPATION TAX DIVISION

160 No. LaSalle Street
Chicago 1, Ill.

State Office Building
Springfield, Ill.

FINAL ASSESSMENT

Registration Number 953-777
Date of Issue 6-26-63
P. A. Code 222-99-5321 P-14258

National Bellas Hess, Inc.
715 Armour Road
North Kansas City, Missouri

Copy to Atty: Benjamin Galton
Robbins & Flato, 21 East
40th Street, New York 16,
New York

A hearing has been held in accordance with the provisions of the Retailers' Occupation Tax Act ☐ and the Municipal Retailers' Occupation Tax Act ☐ and the County Retailers' Occupation Tax Act ☐ and the Use Tax Act ☐ pursuant to protest to the Department's Notice of Proposed Assessment(s) to or against the above taxpayers and request for such hearing thereon. In accordance with the provisions of the aforesaid Act(s), the Department of Revenue hereby issues its FINAL ASSESSMENT(S) to or against the above taxpayers for the amounts of the tax and penalty as shown below:

RETAILERS' OCCUPATION TAX
(Corrected Returns) Period of:

Tax Deficiencies .....$_____
....% Penalty .....$_____

Total Tax Deficiency and Penalty .....$_____

(Determination of Tax Due) Period of:

Tax Delinquencies .....$_____
....% Penalty .....$_____

Total Tax Delinquency and Penalty .....$_____

USE TAX (Corrected Returns) Period of:

Tax Deficiencies .....$_____
....% Penalty .....$_____

Total Tax Deficiency and Penalty .....$_____

(Determination of Tax Due) Period of: July 17, 1961 thru October 31, 1962

Tax Delinquencies $74,593.75
25% Penalty $18,648.43

Total Tax Delinquency and Penalty $93,242.18

RETAILERS' OCCUPATION TAX
(Corrected Returns) Period of:

Tax Deficiencies .....$_____
....% Penalty .....$_____

Total Tax Deficiency and Penalty .....$_____

(Determination of Tax Due) Period of:

Tax Delinquencies .....$_____
....% Penalty .....$_____

Total Tax Delinquency and Penalty .....$_____

	Total Tax	Total Penalties	Total Assessment
Use Tax 100%	$74,592.75	$18,648.43	$93,242.18

Dated this 26th. day of June, 1963

DEPARTMENT OF REVENUE

/s/ THEODORE J. ISAACS
As Director of Revenue

THE ABOVE TOTAL AMOUNT IS PAYABLE IMMEDIATELY

ROT-121 E—Revised Sextuplicate

[fol. 7]

EXHIBIT TO COMPLAINT

CERTIFICATE

STATE OF ILLINOIS,
COUNTY OF SANGAMON, ss.

I, Theodore J. Isaacs, Director of Revenue of the Department of Revenue of the State of Illinois, certify that the attached is a true and complete copy of the Final Assessment issued by the Department of Revenue of Illinois, on June 26, 1963, to National Bellas Hess, Inc., 715 Armour Road, North Kansas City, Missouri, under the Use Tax Act in the total amount of $93,242.18. I further certify that a certified copy of said Final Assessment has been served by this Department on the Secretary of State of Illinois as agent for the said National Bellas Hess, Inc., in accordance with Section 12a of the Use Tax Act.

Dated this 26th. day of June, A.D. 1963

/s/ THEODORE J. ISAACS
Theodore J. Isaacs
Director of Revenue

TJI:CB:bm

[fol. 8]

Exhibit to Complaint

Certificate

State of Illinois,
County of Sangamon, ss.

I, Theodore J. Isaacs, Director of Revenue of the Department of Revenue of the State of Illinois, certify that the attached is a true and complete copy of the Final Assessment issued by the Department of Revenue of Illinois, on June 26, 1963, to National Bellas Hess, Inc., 715 Armour Road, North Kansas City, Missouri, under the Use Tax Act in the total amount of $93,242.18.

Dated this 26th. day of June, A.D. 1963

/s/ Theodore J. Isaacs
Theodore J. Isaacs
Director of Revenue

TJI:CB:bm

[fol. 9]

EXHIBIT TO COMPLAINT

June 26, 1963

Honorable Charles F. Carpentier
Secretary of State
Springfield, Illinois

RE: Registration #953-777
National Bellas Hess, Inc.
715 Armour Road
North Kansas City, Missouri

ATTN: Miss Kathryn Hogan

Dear Miss Hogan:

In accordance with Section 12a of the Use Tax Act, I hereby serve you, as agent for the above named taxpayer, with a certified copy of the Final Assessment issued by this Department under the Use Tax Act to the above named taxpayer in the total amount of $93,242.18.

I request that, as agent for said taxpayer for the service of notices and legal process, you notify said taxpayer of this service upon you.

Kindly acknowledge receipt of above on copy of letter attached.

Very truly yours,

DEPARTMENT OF REVENUE

/s/ THEODORE J. ISAACS
Director

TJI:CB:bm

[fol. 10]

EXHIBIT TO COMPLAINT

AFFIDAVIT OF SERVICE

STATE OF ILLINOIS,
COUNTY OF SANGAMON, ss.

Frances Seipel, being first duly sworn on oath deposes and says:

1. That she is an officer or employee of the Department of Revenue of Illinois who has been authorized by the Director of Revenue of Illinois to serve certified copies of notices and legal processes on the Secretary of State of Illinois as agent for taxpayers who are outside Illinois;

2. That in said capacity, she did, on June 26, 1963, serve a certified copy of a Final Assessment issued on June 26, 1963, by the Department of Revenue of Illinois to National Bellas Hess, Inc., whose address is 715 Armour Road, North Kansas City, Missouri, under the Use Tax Act in the total amount of $93,242.18, on the Secretary of State of Illinois as agent for said National Bellas Hess, Inc., who is outside Illinois, by leaving a certified copy of said Final Assessment at the office of the Secretary of State of Illinois at Springfield, Illinois;

3. That in the capacity aforesaid, she then did, on June 26, 1963, send a certified copy of the same Final Assessment, by United States registered mail, postage prepaid, to National Bellas Hess, Inc., at his last known address 715 Armour Road, North Kansas City, Missouri;

4. That a copy of said Final Assessment is hereto attached.

/s/ FRANCES SEIPEL
Affiant

Subscribed and sworn to before me, a Notary Public, in and for the County and State aforesaid, this 26th day of June, A. D. 1963.

/s/ Virginia M. Overkir
Notary Public

My Commission Expires: August 15, 1965

S-54

[fol. 33]

In the Circuit Court of Cook County

[Title omitted]

Affidavit of Service and Alias Summons and Returns

Alfred T. Walsh, being duly sworn on oath, deposes and says as follows:

(1) That he is the duly authorized agent and representative of the Director of Revenue of the Department of Revenue of the State of Illinois and authorized to serve a certified copy of the Alias Summons on the Secretary of State of Illinois as agent for National Bellas Hess, Incorporated, a corporation, located outside the State of Illinois;

(2) That in said capacity, he did on January 13, 1964, serve a certified copy of the Alias Summons issued by the Clerk of the Circuit Court of Cook County, Illinois, issued to Charles F. Carpentier, Secretary of State, pursuant to the Use Tax Act, Ill. Rev. Stat. (1963) Chapter 120, Section 439.12(a), as agent for said National Bellas Hess, Incorporated, a corporation, 715 Armour Road, North [fol. 34] Kansas City, Missouri, by leaving a certified copy of said Alias Summons at the office of the Secretary of State of Illinois at Springfield, Illinois, and a copy of the Complaint filed in this cause;

(3) That in the capacity aforesaid he then did on January 23, 1964, send a like and true certified copy of the Alias Summons, along with a copy of the Complaint filed in this cause, by United States Registered Mail, postage prepaid, to National Bellas Hess, Incorporated, a corporation, at its last known address, 715 Armour Road, North Kansas City, Missouri;

(4) That a certified copy of said Alias Summons is hereto attached.

Alfred T. Walsh, Affiant.

Subscribed and sworn to before me, a Notary Public, in and for the County and State aforesaid, this 22nd day of January, A. D. 1964.

Alice M. Korthauer, Notary Public. My Commission Expires: April, 1964.

[fol. 35] STS #23317

[Stamp—Complaint Waived by Order of Court]

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ALIAS

No. 63C 21015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS

v.

NATIONAL BELLAS HESS, INCORPORATED a corporation

SUMMONS

To the defendant:

You Are again Summoned and required to file an answer in this case, or otherwise file your appearance, in the Office of the Clerk of this Court (located in the County Building, Room 412, 118 North Clark Street, Chicago, Illinois), within 30 days after service of this summons, not counting the day of service. If You Fail to Do So, a Judgment or Decree by Default May Be Taken Against You for the Relief Asked in the Complaint.

To the officer:

This summons must be returned by the officer or other person to whom it was given for service, with indorsement of service and fees, if any, immediately after service. If service cannot be made, this summons shall be returned

so indorsed. This summons may not be served later than 30 days after its date.

Witness, ...
Joseph J. McDonough, Clerk of Court

January 8, 1964

William G. Clark, Attorney General, State of Illinois, 160 North LaSalle St., Chicago 1.

Date of service: ....., 19.....

(To be inserted by officer on copy left with defendant or other person)

[fol. 36]

CIRCUIT COURT OF COOK COUNTY

SHERIFF'S FEES

Service and return ..... $.....
Miles ....
Total ..... $.....

....., Sheriff of Cook County

I certify that I served this summons on defendants as follows:

(a)—(Individual defendants—personal):

By leaving a copy and a copy of the complaint with each individual defendant, personally, as follows:

Name of defendant	Date of service
.....	.....
.....	.....
.....	.....
.....	.....

(b)—(Individual defendants—abode):

By leaving a copy and a copy of the complaint at the usual place of abode of each individual defendant with a person

of his family, of the age of 10 years or upwards, informing that person of the contents of the summons, and also by sending a copy of the summons and of the complaint in a sealed envelope with postage fully prepaid, addressed to each individual defendant at his usual place of abode, as follows:

Name of defendant	Person with whom left	Date of service	Date of mailing
.....	.....	.....	.....
.....	.....	.....	.....
.....	.....	.....	.....

(c)—(Corporation defendants):

By leaving a copy with the registered agent, officer or agent of each defendant corporation, as follows:

Defendant corporation

National Bellas Hess, Inc.
715 Armour Road
North Kansas City, Missouri

Registered agent, officer or agent

Serve Secretary of State,
Charles F. Carpentier, pursuant
To The Use Tax Act, Ill. Rev. Stat. (1963)
Chapter 120 section 439.12A

Date of service

.....
.....

(d)—(Other service):

Recd Nicholas Ciaccio

....., Sheriff of Cook County

By ....., Deputy

Joseph P. McMahon
Clerk of the Circuit Court of Cook County

[fol. 37] STS #23317

[Stamp—Complaint Waived by Order of Court]

IN THE NAME OF THE PEOPLE OF THE STATE OF ILLINOIS

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

ALIAS

No. 63C 21015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS

v.

NATIONAL BELLAS HESS, INCORPORATED, a corporation

SUMMONS

To the defendant:

You Are again Summoned and required to file an answer in this case, or otherwise file your appearance, in the Office of the Clerk of this Court (located in the County Building, Room 412, 118 North Clark Street, Chicago, Illinois), within 30 days after service of this summons, not counting the day of service. If You Fail to Do So, a Judgment or Decree by Default May Be Taken Against You for the Relief Asked in the Complaint.

To the officer:

This summons must be returned by the officer or other person to whom it was given for service, with indorsement of service and fees, if any, immediately after service. If service cannot be made, this summons shall be returned so

indorsed. This summons may not be served later than 30 days after its date.

Witness, ...
Joseph J. McDonough, Clerk of Court

(Seal) Jan. 8, 1964

Wiliam G. Clark, Attorney General, State of Illinois, 160 North LaSalle St., Chicago 1.

Date of service: ....., 19....
(To be inserted by officer on copy left with defendant or other person)

[fol. 38] National Bellas Hess, Inc.

715 Armour Road
North Kansas City, Missouri
Serve Secretary of State, Charles F. Carpentier, pursuant To The Use Tax Act, Ill. Rev. Stat. (1963), Chapter 120 section 439.12A

Recd: Nicholas R. Ciaccio

[fol. 39]
State of Illinois,
County of Cook, ss.

I, Joseph J. McDonough, Clerk of the Circuit Court of Cook County, and the keeper of records and files thereof, in the State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain Alias Summons, issued out of this office on the 8th day of January, 1964 A.D. in a certain cause lately pending in said Court, on the law side thereof, between Department of Revenue of the State of Illinois for the Use of the People of the State of Illinois, Plaintiff, and National Bellas Hess, Inc., etc., Defendant.

In Witness Whereof, I have hereunto set my hand and affixed the Seal of said Court, at Chicago, in said County, this 8th day of January, 1964.

(Seal)

Joseph J. McDonough, Clerk.

[fol. 42]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, TAX DIVISION

[Title omitted]

SPECIAL APPEARANCE AND MOTION TO SET ASIDE AND QUASH SERVICE OF ALIAS SUMMONS, OR, ALTERNATIVELY, TO SET ASIDE AND QUASH ALIAS SUMMONS, AND DISMISS COMPLAINT—Filed March 24, 1964

Now comes National Bellas Hess, Incorporated (hereinafter called "National Bellas"), by its attorneys, Leibman, Williams, Bennett and Baird, and enters its special and limited appearance for the sole purpose of objecting to the jurisdiction of this Court over its person and moves the Court to set aside and quash the service of the alias summons herein, which plaintiff attempted to make upon it on or about January 23, 1964, or, alternatively, to set aside and quash the alias summons herein, which plaintiff attempted to serve upon it on or about January 23, 1964, and dismiss the complaint.

[fol. 43] As its grounds in support of this motion, National Bellas states that the purported service of alias summons and the purported alias summons, jointly and severally, are void and should be quashed by the Court, because the purported service was not made in accordance with applicable Illinois statutes and its process cannot and does not extend, pursuant to pertinent Illinois statutes, to National Bellas in the premises. Alternatively, as its grounds in support of this motion, National Bellas states that the purported service of alias summons and the purported alias summons, jointly and severally, are void and should be quashed by the Court, because, if such pertinent Illinois statutes are construed to apply to National Bellas in the premises, they, jointly and severally, are unconstitutional, pursuant to applicable provisions of the Illinois

Constitution and the Constitution of the United States, and of no force and effect whatsoever, insofar as National Bellas is concerned.

In its complaint herein, plaintiff admits that National Bellas "is incorporated in another state and has its principal place of business outside the State of Illinois" (Compl., par. (3)). Nowhere does plaintiff allege, or even infer, that National Bellas ever has had or now has a place of business in Illinois. The fact is that National Bellas has not, at any time material herein, had and now does not have any place of business in Illinois.

[fol. 44] It also is clear that plaintiff does not allege, or even infer, in its complaint that National Bellas, admittedly a foreign corporation, ever has qualified or now is qualified to do business in Illinois. See, Illinois Business Corporation Act, as amended, Sections 102 *et seq.* (32 S.H.A., §§157.102 *et seq.*). The fact is that National Bellas has not, at any time material herein, qualified and now is not qualified to do business in Illinois.

The complaint was filed by plaintiff with the Court on October 15, 1963. Summons was issued by the Court on the same date. Purported service thereof was made on November 1, 1963. On or about November 27, 1963, National Bellas appeared specially herein and moved the Court to set aside and quash the service of summons, or, alternatively, to set aside and quash the summons, and dismiss the complaint. By its Order of December 13, 1963, the Court granted National Bellas' motion to set aside and quash service of summons and also set aside and quashed such service and granted to plaintiff leave to obtain and serve an alias summons herein.

Plaintiff obtained an alias summons from the Court on January 8, 1964, with the following endorsement regarding service thereon:

(1) "National Bellas Hess, Inc.
715 Armour Road
North Kansas City, Missouri"

[fol. 45]

(2) "Serve Secretary of State,
Charles F. Carpentier, pursuant
To The Use Tax Act, Ill. Rev. Stat. (1963)
Chapter 120 section 439.12A"

On January 13, 1964, plaintiff made purported service of the alias summons and complaint herein on the Illinois Secretary of State pursuant to the pertinent provisions of Section 12a, Illinois Use Tax Act (120 S.H.A., §439.12a). Subsequently, and via United States registered mail under date of January 23, 1964, purported service of such alias summons and complaint was made, pursuant to such provisions of Section 12a, Illinois Use Tax Act, by plaintiff on National Bellas at its principal office and place of business in North Kansas City, Missouri.

Plaintiff's complaint herein seeks to recover the sum of $93,242.18 from National Bellas. Such sum is alleged to be comprised of the principal amount of $75,593.75, representing a purported delinquent use tax required to be collected and collected, pursuant to the pertinent provisions of the Illinois Use Tax Act, by National Bellas for the "period of July 17, 1961 thru October 31, 1962", and the additional amount of $18,648.43, representing a purported 25% statutory penalty on such alleged delinquency (Compl., pars. 5 and 6 and Exhs. referred to therein). Section 8, Illinois Use Tax Act, provides that (120 S.H.A., §439.8):

> "The tax herein *required to be collected* by any retailer pursuant to this Act, and any such tax *collected* by any retailer shall constitute a *debt* owed by the [fol. 46] retailer to this State, except when such retailer is relieved of the duty of remitting such tax to the Department [of Revenue] by virtue of his being required to pay the tax imposed by the Retailers' Occupation Tax Act upon his gross receipts from the same transaction." (Italics supplied)

It is obvious that the complaint herein attempts to bottom a debt action against National Bellas on Section 8, Illinois Use Tax Act. In short, plaintiff is proceeding against National Bellas *in personam* in a purported action based on jurisdiction of National Bellas' person. *McCormick* v. *Blaine et al.* (Sup. Ct., Ill., 1931), 345 Ill. 461, 178 N.E. 195, 197. Manifestly, for plaintiff to maintain such action, this Court must, by due process, acquire jurisdiction over the person of National Bellas in the premises.

Insofar as service of process is concerned, Section 12a, Illinois Use Tax Act, which was added to the statute by the Act of July 25, 1961, provides that (120 S.H.A., §439.12a):

> "Any *non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act,* and any *resident* of this State who incurs tax liability under this Act as a *seller* and who subsequently removes from this State or conceals his whereabouts, and any person *(resident or non-resident)* who incurs tax liability under this Act as a *user* in this State and who removes from this State or conceals his whereabouts, shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial [fol. 47] or administrative proceeding under this Act. Such process or notice shall be served by the Department [of Revenue] on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the *taxpayer* by registered or certified mail, postage prepaid, a like and true certified copy, with an endorsement thereon of the service upon said Sec-

retary of State, addressed to such *taxpayer* at his last known address.

"Service of process or notice in the manner provided for in this Section, under the circumstances specified in this Section, shall be of the same force and validity as if served upon the *taxpayer* personally within this State. Proof of such service upon the *taxpayer* in this State through the Secretary of State as his agent and by mailing to the last known address of the *taxpayer* may be made in such judicial or administrative proceeding by the affidavit of the Director of Revenue, or his duly authorized representative who made such service, with a copy of the process or notice that was so served attached to such affidavit." (Italics supplied)

It is manifest that, as it is shown *supra,* National Bellas has not, at any time material herein, been and now is not a "resident" "seller" within the meaning of Section 12a, Illinois Use Tax Act. Patently, it has not, at any time material herein, been and now is not a "resident or non-resident" "user" in Illinois within the meaning of that Section of the Act.

Obviously, plaintiff is attempting to maintain service of process herein, pursuant to Section 12a, Illinois Use Tax Act, on the purported ground that National Bellas is a "non-resident of this State who accepts the privilege ex- [fol. 48] tended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State within the meaning of Section 2 of this Act." It is clear that National Bellas has not, at any time material herein, been and now is not a "Retailer maintaining a business in this State" within the meaning of that term set forth in Section 2, paragraph 1, Illinois Use Tax Act.

Assuming, *arguendo,* that Section 2, paragraph 2, of such Act, which further defines such term as "any retailer * * * Engaging in soliciting orders within this State from users by means of catalogues or other advertising,

whether such orders are received or accepted within or without this State", is valid and constitutional, insofar as National Bellas is concerned, it is evident that National Bellas has not, at any time material herein, been and now is not a retailer within such definition, since it has not, at any time material herein, been engaging and now is not engaging "in soliciting orders within this State". Moreover, it has not, at any time material herein, accepted, sought, or received and now is not accepting, seeking, or receiving any "privilege" whatsoever from Illinois regarding its business and its conduct thereof, such as Section 12a, Illinois Use Tax Act, purports to set forth.

Since National Bellas has not, at any time material herein, engaged and now is not engaging in any business [fol. 49] other than interstate commerce, as a non-resident, with Illinois, its "privilege" to engage in such interstate commerce is not extended by the laws of Illinois, but is provided by the United States pursuant to the interstate commerce clause of the Constitution of the United States (U.S. Const., Art. I, §8, cl. 3). Furthermore, National Bellas has not, at any time material herein, distributed and now does not distribute its catalogues to Illinois addressees except by United States mail from without the State. The use of the mails is not a "privilege" granted by Illinois; it is a property right of National Bellas and within the exclusive jurisdiction of the United States (U.S. Const., Art. I, §8, cl. 7; *Hoover* v. *McChesney* (Cir. Ct., D. Ky., 1897), 81 Fed. 472, 477-478, 480-481; *Maxwell* v. *United States* (C.A. 8, 1956), 235 F.(2d) 930).

Clearly, National Bellas has not, at any time material herein, been and now is not a "taxpayer" within the meaning of Section 12a, Illinois Use Tax Act. The tax in question is imposed directly on the purchaser or user in the premises; it is the purchaser's or user's sole liability. The retailer's role is, in any event, merely that of a collector for the State. *Turner* v. *Wright* (Sup. Ct., Ill., 1957), 11 Ill.(2d) 161, 142 N.E.(2d) 84; *Henneford* v. *Silas Mason Co.* (1937), 300 U.S. 577, 81 L.Ed. 814; *Felt & Tarrant Mfg.*

Co. v. *Gallagher* (1939), 306 U.S. 62, 83 L.Ed. 488; *McLeod* [fol. 50] v. *Dilworth Co.* (1944), 322 U.S. 327, 88 L.Ed. 1304; *General Trading Company* v. *State Tax Commission* (1944), 322 U.S. 335, 88 L.Ed. 1309. There is nothing in the Illinois Use Tax Act that ever has constituted or now constitutes a retailer as a "taxpayer".

It is manifest that, in the premises, National Bellas could not be and was not served with purported process herein, pursuant to Section 12a, Illinois Use Tax Act, as a "taxpayer". In such circumstance, the certified mailing of such purported process by plaintiff to National Bellas on or about January 23, 1964, was and is a nullity. There is no provision in that Section or any other statute for any such purported service of process on a "retailer".

The attempted service of process herein on the Secretary of State on January 13, 1964, also is a nullity. With regard to a non-resident retailer, Section 12a, Illinois Use Tax Act, is vague and indefinite, insofar as service of process is concerned. The purported service of process on the Secretary of State requires him to do nothing in the premises. He merely files it and does nothing regarding the notification of the alleged defendant (Nat'l. Bellas Special Appear. and Mot., filed Nov. 27, 1963, pp. 3-4). Compare with the pertinent provisions of Section 111, Illinois Business Corporation Act (32 S.H.A., §157.111) and Section 17, Illinois Civil Practice Act, regarding ser- [fol. 51] vice of process on foreign corporations authorized to transact business in Illinois and on non-resident defendants, respectively.

If Sections 2 and 12a, Illinois Use Tax Act, are construed to apply to National Bellas in the attendant circumstances, such statutory provisions, jointly and severally, are repugnant to and in violation of the due process requirements of Section 1, 14th Amendment, Constitution of the United States and of Section 2, Article II, Constitution of Illinois. In sum, such statutory construction renders those provisions of the Illinois Use Tax Act

unconstitutional and of no force and effect whatsoever, insofar as National Bellas is concerned.

None of the line of cases pertaining to a State use tax and the imposition of collection liability therefor on vendors engaged in interstate commerce has, to date, been concerned with the jurisdictional due process issue inherent in an *in personam* action, such as the case at bar. Such line of cases reveals, on careful scrutiny of the facts and the law, that either the vendor in question submitted to the State court's jurisdiction in the premises or the particular action was one *in rem* or *quasi in rem*. See, in this regard, *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939), 306 U.S. 62, 83 L.Ed. 488; *Nelson* v. *Sears, Roebuck & Co.* (1941), 312 U.S. 359, 85 L.Ed. 888; *Nelson* v. *Montgomery* [fol. 52] *Ward & Co.* (1941), 312 U.S. 373, 85 L.Ed. 897; *General Trading Co.* v. *State Tax Comm'n.* (1944), 322 U.S. 335, 88 L.Ed. 1309; *Miller Brothers Co.* v. *Maryland* (1954), 347 U.S. 340; 98 L.Ed. 744; and *Scripto, Inc.* v. *Carson* (1960), 362 U.S. 207, 4 L.Ed.(2d) 660.

It is fundamental in the system of government in the United States that Illinois, as one of the several sovereign States comprising the United States, is not empowered or authorized to exercise *in personam* jurisdiction on a nationwide basis. Equally basic is the fact that jurisdiction over National Bellas' person does not follow as a necessary circumstance of Illinois jurisdiction to apply local law to the controversy herein. Traditional territorial restrictions on a State's *in personam* jurisdiction are not a dead letter of the law. To hold otherwise in the circumstances before the Court here is to invite a return to the chaos in interstate commerce that existed in the United States, prior to the adoption of the Constitution by the States in 1789, under the Articles of Confederation.

Although the Supreme Court of the United States appears to have enlarged the concept of State *in personam* jurisdiction over foreign corporations in interstate commerce in the series of cases from *International Shoe Co.* v. *Washington* (1945), 326 U.S. 310, 90 L.Ed. 95, to *McGee*

v. *International Life Insurance Co.* (1957), 355 U.S. 220, 2 L.Ed.(2d) 223, each of those cases is clearly distinguish-
[fol. 53] able on the facts from National Bellas' situation herein. As the Supreme Court pointedly stated, with regard to a State's *in personam* jurisdiction over non-residents, in the later case of *Hanson* v. *Denckla* (1958), 357 U.S. 235, 2 L.Ed.(2d) 1283, 1296:

> "• • • . But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. See Vanderbilt v. Vanderbilt, 354 U.S. 416, 418, 1 L ed 2d 1456, 77 S Ct 1360. Those restrictions are more than a guarantee of immunity from inconvenient or distant litigation. They are a consequence of territorial limitations on the power of the respective States. However minimal the burden of defending in a foreign tribunal, a defendant may not be called upon to do so unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him. • • • ."

Manifestly, Illinois has sought to evade the constitutional inhibition against extra-territorial process in an *in personam* proceeding, like that attempted by it against National Bellas herein, by a bootstrap legislative maneuver. The bootstrap, which must fail in the attendant circumstances, is the artificial definition of "maintaining a business in this State" set forth in Section 2, paragraph 2, Illinois Use Tax Act, *supra,* which was added to that Section by the Act of July 17, 1961 (120 S.H.A., §439.2, as amended). Such failure is inherent in the pertinent decisions of the Illinois Supreme Court in *Grobark* v. *Addo Machine Company, Inc.* (Sup. Ct., Ill., 1959), 16 Ill.(2d) 426, 158 N.E.(2d) 73, and the United States Court [fol. 54] of Appeals for the Seventh Circuit in *Trippe Manufacturing Company* v. *Spencer Gifts, Inc.* (C.A. 7, 1959), 270 F.(2d) 821.

In the *Grobark* case, the Illinois Supreme Court held that, when a New York corporation, with no agents or offices in Illinois, contracted from without Illinois and shipped goods into Illinois by means of an independent carrier, such non-resident vendor was not transacting business in Illinois, so as to constitute an act subjecting it to the jurisdiction of an Illinois court. In that case, the Superior Court of Cook County quashed service of summons on defendant Addo Machine Company and its order was affirmed by the Illinois Appellate Court, First District. The Illinois Supreme Court, in affirming the Superior Court and the Appellate Court, stated, in pertinent part, that (158 N.E.(2d) 79):

> "In the instant case, Addo contends that it has not subjected itself to the jurisdiction of the Illinois courts. Hanson v. Denckla, setting out limitations on a State's power in *in personam* jurisdiction, supports this contention.
>
> "In the present case, the record shows that the defendant, Addo Machine Company, Inc., is a corporation organized conformably to the laws of the State of New York and domiciled in that State. It is not licensed to do business within the State of Illinois. It manufactures adding machines outside of Illinois and ships these machines to purchasers throughout the United States. It does not and has not at any time maintained any offices in Illinois, nor employed any officers, agents or employees or other persons within the State. From May 19, 1953, de-[fol. 55] fendant, pursuant to the letter of that date addressed to plaintiffs, began to sell its machines to plaintiffs at a distributor discount rate. The sales were consummated when plaintiffs placed orders with the defendant in New York, and defendant accepted the orders, delivering its product to independent carriers in New York. On or about July 1, 1955, defendant advised plaintiffs that beginning October 1, 1955,

they would no longer be exclusive distributors of defendant's products in the Greater Chicago Trading Area, and after the latter date defendant sold its machines at a distributor level and to the individual defendants and to other distributors. Defendant did not at any time own any interest in any corporation, partnership, or individual distributing its products in Illinois, and did not at any time have the right to exercise any control over the distributors; the relationship between defendant and distributor being that of seller and purchaser. After October 1, 1955, the defendant continued to sell equipment to plaintiffs on a dealer price level until January 1, 1956, when it declined to accept any further orders from plaintiffs.

"• • • • •.

"As recently announced by the United States Supreme Court, in the Hanson case, there are still territorial limitations to a State's *in personam* jurisdiction. Since Addo did not have 'minimum contacts' with the State of Illinois, we are of the opinion that Addo did not submit to the jurisdiction of the Illinois courts."

The United States Court of Appeals ruled in the *Trippe* case that, when a New Jersey corporation, with its sole place of business in that State, engaged in the mail order business, including the mailing of catalogues to residents of Illinois, where it was not licensed to do business, and conducted no other business in Illinois, such non-resident vendor was not transacting business in Illinois, so as to [fol. 56] constitute an act subjecting it to the jurisdiction of an Illinois court or to Illinois' non-resident jurisdictional statute in an action brought by an Illinois corporation in the United States District Court in Illinois. In reversing the United States District Court, which had recommended immediate interlocutory appeal pursuant to 28 U.S. Code, §1292(b), and directing the quashing of

service of summons and dismissal of the complaint and action for lack of jurisdiction, the Court of Appeals stated, in pertinent part, that (270 F.(2d) 822-823):

"Plaintiff argues that defendant submitted itself to the jurisdiction of Illinois courts because defendant's activities in mailing catalogs into Illinois came within the provisions of §17 of the Illinois Civil Practice Act. • • •.

"The first question for us to consider is whether defendant, by sending catalogs into Illinois through the mail, was engaged in the transaction of any business within the State of Illinois.

"Plaintiff cites McGee v. International Life Insurance Company, 1957, 355 U.S. 220, 78 S. Ct. 199, 2 L.Ed. 2d 223. However, we think the more recent case of Hanson v. Denckla, 1958, 357 U.S. 235, 252-253, 78 S. Ct. 1228, 2 L.Ed. 2d 1283, demonstrates the McGee case has been limited by the Court to the insurance field. • • •.

"The Illinois statute heretofore quoted [Ill. Civ. Prac. Act, §17], as well as similar non-resident jurisdictional statutes in other states, have, since the time of Pennoyer v. Neff, 1877, 95 U.S. 714, 24 L.Ed. 565, widened considerably the bases for service on non-resident defendants in *in personam* suits. However, there still remain important limitations on a state's power to extend jurisdiction beyond its territorial limits. Hanson v. Denckla, 357 U.S. 235, 78 S. Ct. 1228, [fol. 57] 2 L.Ed. 2d 1283; Orton v. Woods Oil & Gas Co., 7 Cir., 249 F.2d 198; Grobark v. Addo Machine Co., Inc., 16 Ill. 2d 426, 158 N.E.2d 73. We think the Grobark case is controlling on the point we are now considering. It is the last word we have from the Illinois Supreme Court. • • •.

"• • • • •.

"Plaintiff would minimize the importance and the pertinency of the Grobark decision stating that the

Court there would not take *in personam* jurisdiction where the defendant had conducted 'no economic activity of any consequence in the forum'. We do not think the case can be distinguished on that ground. * * *. We think there was much more economic activity in the Grobark case than in the case before us, yet the Illinois Supreme Court determined that the defendant's contacts in Illinois in Grobark were insufficient for the purposes of assuming jurisdiction.

"We hold that under Illinois law, defendant did not have those 'minimal contacts' which are essential to the transaction of any business within the state of Illinois.

"Plaintiff also contends that by mailing into Illinois catalogs which contained false statements, defendant committed a tortious act within Illinois. We think the answer to this claim is that defendant did not perform any act in the State of Illinois, tortious or otherwise."

It must be pointed out that convenience furnishes no basis for determination of the jurisdiction of any State court or any other court. There never has been and there now is not a doctrine of *forum conveniens* in the law. The familiar doctrine of *forum non conveniens* is only for declining jurisdiction, if a court already has it, and not for gaining jurisdiction. For a foreign corporation to be subject to a State's laws, including process, it must be acting [fol. 58] in the State through the corporation's agents or servants. In *Cannon Mfg. Co.* v. *Cudahy Packing Co.* (1925), 267 U.S. 333, 69 L.Ed. 634, the Supreme Court of the United States ruled that action of an independent contractor in a State will not subject a foreign corporation to that State's laws. Patently, in carrying the mail, as it does for National Bellas in distribution of catalogues, the United States is an independent contractor. No State is empowered or authorized to extend its laws beyond its borders to out-of-state conduct merely to afford a more convenient judicial forum to itself or its people. To hold

otherwise, as Illinois appears to seek herein, is to fly in the very teeth of the due process provisions of the Constitution of the United States and the Illinois Constitution.

Pursuant to Section 20(2), Illinois Civil Practice Act, there are appended hereto and made a part hereof, as fully as though they were set out, *in extenso,* here, the supporting affidavits of National Bellas' vice-president, Aaron Maer, and of its general counsel, Herman A. Benjamin.

Dated: March 24, 1964.

Leibman, Williams, Bennett and Baird, By Julian R. Wilheim, Attorneys for National Bellas Hess, Incorporated, 208 South LaSalle Street, Chicago 4, Illinois, FInancial 6-2200.

[fol. 59]

AFFIDAVIT TO SPECIAL APPEARANCE, ETC.

IN THE CIRCUIT COURT OF COOK COUNTY

AT LAW

No. 63 C 21015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

v.

NATIONAL BELLAS HESS, INCORPORATED, a corporation, Defendant.

State of New York,
County of New York, ss:

Aaron Maer, being duly sworn, deposes and says:

That he is a Vice-President of National Bellas Hess, Inc., a corporation, (named herein as "National Bellas

Hess, Incorporated",) the defendant in the within proceeding.

This affidavit is made in support of the Company's Special Appearance and the motion of its Counsel to set aside and quash service and/or to dismiss the complaint herein.

Your deponent in his capacity as Vice-President is personally familiar with the facts herein, having acquired his information, as hereinafter set forth in the course of his duties.

National Bellas Hess, Inc. is a Delaware corporation, duly qualified to do business, doing business, and with its sole place for the doing of business, within the State of Missouri; it has not qualified or registered to do business in Illinois; nor, in fact, in any state other than Delaware and Missouri. It has no registered agent in Illinois, and has not authorized any person to act as its agent, either to receive process, or accept service, or apply for, receive or accept any licenses or permits, in Illinois.

[fol. 60] National Bellas Hess, Inc. is a national mail order company which issues a number of catalogs during the year. There are issued annually two main catalogs ("Spring & Summer; and "Fall & Winter") and a number of intermediate smaller "sales books", or "flyers". Catalogs, sales books and flyers are disseminated to customers and potential customers solely and entirely through the use of the United States mails.

They are mailed only, always, from North Kansas City, Missouri. They are not shipped by truck or otherwise to any other mailing point, as some companies do. The company's only plant is located in North Kansas City, and all its mail order activities are carried on there, except for purchasing, which is done in the first instance by a wholly owned New York subsidiary, in New York City.

The catalogs present a wide variety of merchandise, at retail. A main catalog contains approximately 4000 different items, and is mailed to the Company's own list of customers, maintained by it in Kansas City. This list was

originally acquired from a predecessor Company in 1932, and then consisted of about 5,000,000 names. As time goes on, and customers fail to order, their names are weeded out. As new customers are secured, their names are added. A "Catalog" (using this designation for one of the two main books, to distinguish it from all other smaller books, hereafter referred to as "flyers") is too costly to distribute casually, or carelessly. It is sent only to active, recent customers, who have ordered a minimum amount of merchandise within a specified time, and is mailed to customer [fol. 61] by name, from his stencil. Flyers are also mailed thus, but to a less restricted list. They may also occasionally be mailed in bulk, or addressed to "occupant" (here the local postmaster delivers as indicated) or, as is more usual, enclosed in the parcels sent to customers in filling orders from a prior flyer or catalog. In any case, it will be noted, the mails are employed; and the mailing is from the only location where the Company has warehouses and assembly and distribution points, to wit—North Kansas City, Missouri. Thus sales to Illinois residents are filled from the only warehouses we have, which are all in North Kansas City. They are shipped by the cheapest available method of transportation, which in most cases is mail, but occasionally it could be railway express for a bulky item or for one which is too large for the receiving post office to handle. If a customer should specify any particular method of shipment, it would be followed if possible. However, in no case would it be sent except by common carrier; we ourselves have no trucks delivering in Illinois or anywhere else, for that matter.

Orders from customers are received only in its office, plant and warehouse in North Kansas City, Missouri and in no other location, and all normal correspondence in connection with such orders with customers, the review and acceptance of such orders, and the filling of such orders are made from one of its warehouses and plants in Kansas City.

The Company does not maintain, keep or use, nor has it ever in the past maintained, kept or used, permanently or temporarily, directly or indirectly, or through any agent, any office, branch, place of distribution, sales or sample room, warehouse or storage place in Illinois. The defendant does not have nor has it ever had any representative, agent, salesman, canvasser or solicitor operating in the State of Illinois for the purpose of selling or taking orders for tangible personal property, or delivering the same, or [fol. 62] accepting payments or servicing any of the products it sold.

It owns no tangible property in the State of Illinois whether realty or personalty.

It owns no motor vehicles in the State of Illinois, nor does it hold any licenses for motor vehicles in the State of Illinois.

It does not prepare or supply any advertising displays for use in Illinois and does not advertise its products for sale in newspapers, billboards, radio or TV within the State of Illinois.

It has brought no suits in the State of Illinois.

In brief, the defendant maintains no place of business in Illinois and is not qualified to do, nor is it doing, business in, the State of Illinois.

Aaron Maer

Sworn to before me, this 23rd day of March, 1964.

Rose Crystal, Notary Public, State of New York, No. 24-5871100, Qualified in Kings County, Cert. filed in New York County, Commission Expires March 30, 1964.

[fol. 63]

AFFIDAVIT TO SPECIAL APPEARANCE, ETC.

IN THE CIRCUIT COURT OF COOK COUNTY

At Law

No. 63 C 21015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

v.

NATIONAL BELLAS HESS, INCORPORATED, a corporation, Defendant.

State of New York,
County of New York, ss:

Herman A. Benjamin, being duly sworn, deposes and says:

That he is a member of the Bar of the State of New York, duly admitted to practice in the State of New York in 1926; that he is General Counsel for National Bellas Hess, Inc., (a corporation, named herein as National Bellas Hess, Incorporated,) the defendant in the within proceeding, and as such General Counsel has familiarized himself with the relevant facts herein.

That he makes this affidavit to support the Company's Special Appearance and the motion of Leibman, Williams, Bennett & Baird, its Counsel specially retained for that purpose, to set aside and quash service and/or to dismiss the complaint herein; and to supplement in certain details which are not within the purview of the duties of Aaron Maer, a Vice-President of the defendant corporation, the affidavit of said Aaron Maer concerning the subject matter hereof.

Defendant corporation is a Delaware corporation, qualified to do business in the State of Missouri and in no other jurisdiction. It maintains no place of business in Illinois.

[fol. 64] Not being subject to the Income Tax provisions of the State of Illinois, nor to the other statutes hereinafter mentioned, it does not and has not filed any Illinois income tax, nor other Illinois tax returns. The Company has not registered under the Retailers Occupation Tax Act and holds no Certificate of Registration under the Illinois Use Tax Act. It has never made application for such Certificate of Registration, nor has it ever received any such Certificate of Registration, and your deponent avers that to the extent that the complaint alleges that the defendant was issued a Certificate of Registration, that if such Certificate was issued, it was not done "as provided by law" as therein stated, for the reason that no application has ever been made therefor; and deponent affirms also that no such Certificate of Registration has ever been received.

The defendant has never registered under the Illinois Use Tax Act or offered security to insure collections under §6 of said Act; the defendant (which must be considered a non-resident, for purposes of §12a of the Illinois Use Tax Act) does not maintain a place of business in Illinois; it has never been a resident who "subsequently removed from" the State of Illinois, nor is it a "user" within the term of that Statute.

Herman A. Benjamin

Sworn to before me this 23rd day of March, 1964.

Rose Crystal, Notary Public, State of New York, No. 24-5871100, Qualified in Kings County, Cert. filed in New York County, Commission Expires March 30, 1964.

[fol. 65]

IN THE CIRCUIT COURT OF COOK COUNTY

ILLINOIS COUNTY DEPARTMENT

LAW DIVISION

General No. 63C21015

DEPT. OF REVENUE, ETC., Pltf.,

v.

NAT'L BELLAS HESS, INC., Dft.

ORDER DENYING MOTION TO QUASH SERVICE—May 20, 1964

This cause having come on to be heard on the special appearance of National Bellas Hess, Incorporated and its motion to set aside and quash service of alias summons, etc., filed herein on March 24, 1964, and plaintiff having appeared by its attorney, and National Bellas Hess, Incorporated, having appeared specially, by its attorney, and the Court having been fully advised in the premises,

It Hereby Is Ordered that:

(1) The motion of National Bellas Hess, Incorporated to set aside and quash service of alias summons, filed herein on March 24, 1964, be, and the same hereby is, denied by the Court; and

(2) National Bellas Hess, Incorporated be, and it hereby is, granted to and including 30 days from the date of entry of this Order herein, within which to appear generally herein and also to move with respect to, answer, or otherwise plead to the complaint, as amended, herein.

Enter:

William V. Brothers, Judge.

[File endorsement omitted]

[fol. 69]

IN THE CIRCUIT COURT OF COOK COUNTY

ILLINOIS COUNTY DEPARTMENT

TAX DIVISION

[Title omitted]

MOTION OF DEFENDANT NATIONAL BELLAS HESS, INCORPORATED TO STRIKE OR DISMISS COMPLAINT—Filed June 23, 1964

Now comes defendant National Bellas Hess, Incorporated, by its attorneys, Leibman, Williams, Bennett and Baird, appearing herein pursuant to the Court's Order of May 20, 1964 and without waiver of or prejudice to such defendant's right to persist in and maintain its objection to the Court's jurisdiction over its person, and moves the Court to strike or dismiss plaintiff's Complaint herein for the following reasons:

1. The allegations in Paragraph 1 of the Complaint that "on or after August 1, A.D. 1955, and before the filing of this Complaint, the defendant National Bellas Hess, Incorporated, was engaged in soliciting orders within the [fol. 70] State of Illinois from users by means of catalogues or other advertising, as a retailer of tangible personal property" should be stricken by the Court. They are argumentative and are conclusions of law and fail to plead ultimate facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

2. The allegations in Paragraph 2 of the Complaint that "in accordance with Chapter 120—Revenue, Section 439:2 of the Use Tax Act, as amended, of the Illinois Revised Statutes—in relation to the tax upon the privilege of using tangible personal property in the State of Illinois, it was the duty of the said defendant to pay the tax to the plaintiff, at the rate and in the amount provided by

statute" should be stricken by the Court. They are argumentative and are conclusions of law and fail to plead ultimate facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

3. The allegations in Paragraph 3 of the Complaint "that although the defendant corporation is incorporated in another state and has its principal place of business outside the State of Illinois, the defendant was issued a certificate of Registration, number 953 777 by the Department of Revenue of the State of Illinois, as provided by law" should be stricken by the Court. They are argu- [fol. 71] mentative and are conclusions of law and fail to plead ultimate facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

Furthermore, plaintiff's allegations in Paragraph 3 of the Complaint, which defendant seeks to have stricken by the Court, attempt to mislead the Court with the false impression that, "although the defendant corporation is incorporated in another state and has its *principal* place of business outside the State of Illinois" (italics supplied), it has had, at the times material herein, and still has an actual and existing place of business within Illinois. Section 41, Illinois Civil Practice Act. Plaintiff has, at all times material herein, known and now knows that defendant has not, at any time material herein, had and now does not have any place of business in Illinois. It also has, at all times material herein, known and now knows that defendant, admittedly a foreign corporation, has not, at any time material herein, qnalified and now is not qualified to do business in Illinois, since defendant has not, at any time material herein, transacted and now does not transact business within Illinois within the meaning of the Illinois Business Corporation Act, as amended. See, Illinois Business Corporation Act, as amended, Sections 102 *et seq.* (32 S.H.A., §§157.102 *et seq.*); *Grobark* v. *Addo Machine Company, Inc.* (Sup. Ct., Ill., 1959), 16 Ill.(2d)

426, 158 N.E.(2d) 73; *Trippe Manufacturing Company* v. [fol. 72] *Spencer Gifts, Inc.* (C.A. 7, 1959), 270 F.(2d) 821.

4. The allegations in Paragraph 4 of the Complaint that "in accordance with the provisions of Section 3 of the said Use Tax Act, it was the duty of the defendant to file a return with the plaintiff for each month the defendant was engaged in the said business, showing among other things the total amount of gross sales of all tangible personal property made at retail by the defendant within the State of Illinois during each preceding calendar month and the amount of tax due thereon to the plaintiff, and to pay said tax to the plaintiff" should be stricken by the Court. They are argumentative and are conclusions of law and fail to plead ultimate facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

5. The allegations in Paragraph 5 of the Complaint that, "in accordance with the Use Tax Act plaintiff did determine the amount of tax due from the defendant to the plaintiff for certain months according to its best judgment and information for which months no returns were filed by the defendant with the plaintiff and the latter did thereupon notify the defendant on the 21st day of January, A.D., 1963, by United States registered mail addressed to the defendant at, 715 Armour Road, North Kansas City, Missouri, last known address, and a copy to the Secretary [fol. 73] of State of the State of Illinois, of the amount due upon the returns as corrected and of the amount of the delinquency computed for months wherein no returns were made, stating that it proposed to assess such amount, with penalties, in the sum of Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18), photostatic copies of which proposed assessment and the certificate of mailing are attached hereto and marked plaintiff's Exhibits and made a part hereof" should be stricken by the Court. They are argumentative and are conclusions of law and fail to plead ultimate facts required for proper

and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

Furthermore, plaintiff's allegations in Paragraph 5 of the Complaint, which defendant seeks to have stricken by the Court, are unduly prolix and fail to comply with the pertinent provisions of Section 33, Illinois Civil Practice Act.

6. The allegations in Paragraph 6 of the Complaint that "the defendant did not file a protest to said proposed assessment and did not request a hearing thereon within twenty (20) days after said notice of proposed assessment and thereupon the plaintiff made a final assessment of the amount of tax and penalties proposed against the defendant in the sum of Ninety Three Thousand Two Hundred Forty Two and 18/100 Dollars ($93,242.18)" should be stricken by the Court. They are argumentative and are [fol. 74] conclusions of law and fail to plead ultimate facts required for proper and precise pleading of a complaint, Section 33, Illinois Civil Practice Act.

7. The allegations in Paragraph 7 of the Complaint that, "on the 26th day of June, A.D., 1963, plaintiff mailed to the defendant by United States registered mail addressed to the defendant at, 715 Armour Road, North Kansas City, Missouri, last known address, notice of final assessment, photostatic copies of said notice of final assessment and the certificate of mailing being attached hereto, and a copy to the Secretary of State of the State of Illinois, and made a part hereof, marked plaintiff's Exhibits" should be stricken by the Court. They are argumentative and are conclusions of law and fail to plead ultimate facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

8. The allegations in Paragraph 8 of the Complaint that "the said defendant has not paid any sum on account" should be stricken by the Court. They are vague and ambiguous and are argumentative and fail to plead ultimate

facts required for proper and concise pleading of a complaint. Section 33, Illinois Civil Practice Act.

[fol. 75] 9. The entire Complaint, purporting to seek collection of Illinois use taxes and penalties from defendant, a non-resident vendor, which has not, at any time material herein, and now does not have a place of business within Illinois and which has not, at any time material herein, transacted and now does not transact business within Illinois, should be stricken and dismissed by the Court. It fails to allege material allegations of ultimate fact required to plead a claim or cause of action, upon which relief can be granted by the Court.

(a) Defendant has not, at any time material herein, engaged and now is not engaging in any business other than interstate commerce, as a non-resident, with Illinois. Its privilege to engage in such interstate commerce is not extended by the laws of Illinois. It is provided by the United States pursuant to the interstate commerce clause of the Constitution of the United States (U.S. Const., Art. I, §8, cl. 3).

(b) Defendant has not, at any time material herein, distributed and now does not distribute its catalogues to Illinois addressees except by United States mail from without the State. Such use of the mails is not a "privilege" granted by Illinois. It is a property right of defendant and within the exclusive jurisdiction of the United States (U.S. Const., Art. I, §8, cl. 7; *Hoover* v. *McChesney* (Cir. Ct., D. Ky., [fol. 76] 1897), 81 Fed. 472, 477-478, 480-481; *Maxwell* v. *United States* (C.A. 8, 1956), 235 F.(2d) 930.

(c) Defendant has not, at any time material herein, been and now is not a "taxpayer" within the meaning of the Illinois Use Tax Act. The Illinois use tax is imposed di-

rectly on the purchaser or user in the premises. It is the purchaser's or user's sole liability. The retailer's role under the Illinois Use Tax Act is, in any event, merely that of a collector for the State. *Turner* v. *Wright* (Sup. Ct., Ill., 1957), 11 Ill.(2d) 161, 142 N.E.(2d) 84; *Henneford* v. *Silas Mason Co.* (1937), 300 U.S. 577, 81 L.Ed. 814; *Felt & Tarrant Mfg. Co.* v. *Gallagher* (1939), 306 U.S. 62, 83 L.Ed. 488; *McLeod* v. *Dilworth Co.* (1944), 322 U.S. 327, 88 L.Ed. 1304; *General Trading Company* v. *State Tax Commission* (1944), 322 U.S. 335, 88 L.Ed. 1309. To the same effect, see Rule 7, Par. 1, Ill. Dept. of Rev. Use Tax Rules. There is nothing in the Illinois Use Tax Act that ever has constituted or now constitutes a retailer as a "taxpayer".

(d) The issue sought to be raised by the Complaint herein is manifestly one of Illinois' jurisdiction to impose a tax—the Illinois use tax—on defendant. Such issue can not be obfuscated by gratuitous and euphemistic statements that Illinois is attempting to impose upon defendant only the duty of such tax collection. The State of Illinois [fol. 77] lacks power to lay such use tax on defendant in the attendant circumstances. *Miller Brothers Co.* v. *Maryland* (1954), 347 U.S. 340, 98 L.Ed. 744. Cf. *Henneford* v. *Silas Mason Co., supra; Felt & Tarrant Mfg. Co.* v. *Gallagher, supra; Nelson* v. *Sears, Roebuck & Co.* (1941), 312 U.S. 359, 85 L.Ed. 888; *Nelson* v. *Montgomery Ward & Co.* (1941), 312 U.S. 373, 85 L.Ed. 897; *McLeod* v. *Dilworth Co., supra; General Trading Co.* v. *State Tax Commission* (1944), 322 U.S. 335, 88 L.Ed. 1309; and *Scripto, Inc.* v. *Carson* (1960), 362 U.S. 207, 4 L.Ed.(2d) 660.

(e) In *Nelson* v. *Sears, Roebuck & Co., supra,* where the vendor, unlike defendant herein, submitted to the State

court's jurisdiction in the premises, the Supreme Court of the United States succinctly indicated that the Iowa use tax in question could not and would not be applied to mail order business of non-resident vendors in defendant's situation. In that case, respondent Sears, Roebuck & Co., a New York corporation authorized to do business in Iowa, operated retail stores therein. It contested the constitutionality of the Iowa use tax sought to be imposed on it for orders mailed directly to its out-of-state branches and shipped directly therefrom to the vendees in Iowa by mail or common carrier.

The Supreme Court of the United States, upholding the Iowa use tax in such circumstances, stated, *inter alia,* that (85 L.Ed. 892):

> [fol. 78] . "So the nub of the present controversy centers on the use of respondent as the collection agent for Iowa. The imposition of such a duty, however, was held not to be an unconstitutional burden on a foreign corporation in Monamotor Oil Co. v. Johnson, 292 US 86, * * *, and Felt & T. Mfg. Co. v. Gallagher, 306 US 62, * * *. But respondent insists that those cases involved local activity by the foreign corporation as a result of which property was sold to its local customers, while in the instant case there is no local activity by respondent which generates or which relates to the mail orders here involved. Yet these orders are still a part of respondent's Iowa business. The fact that respondent could not be reached for the tax if it were not qualified to do business in Iowa would merely be a result of the 'impotence of state power'. * * *. Since Iowa has extended to it that privilege, Iowa can exact this burden as a price of enjoying the

full benefits flowing from its Iowa business. * * *. Respondent can not avoid that burden though its business is departmentalized. * * *.

"* * * *.

"Respondent, however, insists that the duty of tax collection placed on it constitutes a regulation of and substantial burden upon interstate commerce and results in an impairment of the free flow of such commerce. It points to the fact that in its mail order business it is in competition with out of state mail order houses which need not and do not collect the tax on their Iowa sales. *But those other concerns are not doing business in the state as foreign corporations.*[1] *Hence, unlike respondent, they are not receiving benefits from Iowa for which it has the power to exact a price.* * * *. (Italics supplied)

[fol. 79] (f) In *Miller Brothers Co.* v. *Maryland, supra,* the State court's jurisdiction over the vendor, unlike defendant herein, purportedly was gained by attachment of such vendor's truck, which was found in Maryland: Appellant Miller Brothers Co., a Delaware corporation not authorized to do business in Maryland, sold directly to its vendees at its sole place of business in Delaware. Although most of such purchases were carried away by the vendees, some were delivered by common carrier or by the vendor's trucks. Maryland sought to compel the vendor to collect its use tax on such sales to Maryland vendees. Its courts ruled in its favor.

Reversing the Maryland Court of Appeals, the Supreme Court of the United States held that, to satisfy the due process requirements of the 14th Amendment of the Con-

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[1] To the same effect, see *Grobark* v. *Addo Machine Company, Inc.* (Sup. Ct., Ill., 1959), 16 Ill.(2d) 426, 158 N.E.(2d) 78, and *Trippe Manufacturing Company* v. *Spencer Gifts, Inc.* (C.A. 7, 1959), 270 F.(2d) 821, which are set forth in defendant's Special Appearance and Motion to Set Aside and Quash Service of Alias Summons, etc. herein, pp. 12-16.

stitution of the United States, there must exist "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" (98 L.Ed. 748). That link, that connection, was found to be absent in the *Miller Brothers Co.* case by the Supreme Court. They are lacking in this case, too. Cf. the *Grobark* case, wherein the Illinois Supreme Court held that a non-resident vendor with no agents or offices in Illinois, which had contracted from without Illinois and shipped goods into Illinois by means of an independent carrier, did not have the required "minimum contacts" with the State of Illinois to confer jurisdiction on its courts (158 N.E.(2d) 79).

[fol. 80] The facts in the *Trippe* case, cited in footnote 1, *supra*, are on all fours with defendant's situation herein. In that case, the vendor, a New Jersey corporation, with its sole place of business in that State, engaged in the mail order business, including the mailing of catalogues to Illinois residents. Such vendor was not licensed to do business and conducted no other business in Illinois. The United States Court of Appeals for the Seventh Circuit ruled that the non-resident vendor was not transacting business in Illinois, so as to constitute an act subjecting it to the jurisdiction of an Illinois court or to Illinois' non-resident jurisdictional statute. In finding the absence of a due process *nexus*, the Court of Appeals declared, *inter alia*, that (270 F.(2d) 822-823):

> "The first question for us to consider is whether defendant, by sending catalogs into Illinois through the mail, was engaged in the transaction of any business within the State of Illinois.
>
> "• • • • • • •
>
> "• • •. We think there was much more economic activity in the Grobark case than in the case before us, yet the Illinois Supreme Court determined that the defendant's contacts in Illinois in Grobark were insufficient for the purposes of assuming jurisdiction.
>
> "We hold that *under Illinois law, defendant did not have those 'minimal contacts' which are essential to the*

transaction of any business within the state of Illinois.

"Plaintiff also contends that by mailing into Illinois catalogs which contained false statements, defendant [fol. 81] committed a tortious act within Illinois. We think the answer to this claim is that *defendant did not perform any act in the State of Illinois, tortious or otherwise.*" (Italics supplied.)

(g) The *Miller Brothers Co.* case, *supra,* plainly established the rule that the irreducible minimum of activity, which is required to exist before a State can make a non-resident vendor a collector of its use tax, is such vendor's solicitation in the State by traveling solicitors based without such State. The Supreme Court of the United States held that the vendor's delivery in the State, even by its own trucks, was not sufficient. It also found that such vendor's advertising, which was projected into Maryland from Delaware by radio, newspapers, and sales circulars mailed to customers, did not supply the required "minimal contacts" in the premises.[2]

(h) The most recent word from the Supreme Court of the United States regarding the liability of a non-resident [fol. 82] vendor for a State use tax is found in *Scripto, Inc.*

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[2] Maryland attempted, in the *Miller Brothers Co.* case, to equate such advertising with the physical presence of solicitors within the State. Manifestly, it misunderstood the second ground of the opinion of the Supreme Court of the United States in *Nelson* v. *Montgomery Ward & Co.* (1941), 312 U.S. 373, 85 L.Ed. 897, which is set forth at 85 L.Ed. 899. In referring to advertising within Iowa as a second ground for upholding Iowa's jurisdiction to compel collection of its use tax, the Supreme Court did not hold that advertising is the jurisdictional equivalent of physical presence in the State, but that such advertising was done by Montgomery Ward's local Iowa retail stores and resulted in tying its interstate sales, although very loosely, to its intrastate business in Iowa. Cf. the so-called "vortex principle" later enunciated by the Supreme Court in *Norton Company* v. *Department of Revenue* (1951), 340 U.S. 534, 95 L.Ed. 517, involving the imposition of the Illinois retailer's occupation tax on a foreign corporation on the basis of gross receipts from all sales to Illinois vendees.

v. *Carson* (1960), 362 U.S. 207, 4 L.Ed.(2d) 660. In that case, the State court's jurisdiction over the vendor, unlike defendant herein, was attained by attachment of such vendor's accounts receivable in Florida. Appellant Scripto, Inc., a Georgia corporation, was required to collect the Florida use tax from its customers in that State because of its solicitation of sales within Florida by independent brokers, who were residents of the State. In sustaining the imposition of the use tax liability in the premises, the Supreme Court distinguished the *Miller Brothers Co.* case, *supra*, by pointing out that the vendor therein, which advertised by radio, newspapers, and mailed sales circulars that reached its Maryland customers, did not physically go into that State to make sales. Patently, the Supreme Court's decision in the *Scripto, Inc.* case does not overrule its holding in the *Miller Brothers Co.* case and is neither pertinent nor applicable to defendant's circumstances herein.

(i) The attempted imposition of the Illinois use tax on defendant herein is invalid, because it is repugnant to and violates the interstate commerce clause of the Constitution of the United States (U.S. Const., Art. I, §8, cl. 3). To hold otherwise in the circumstances before the Court is to invite a return to the chaos in interstate commerce that existed in [fol. 83] the United States under the Articles of Confederation prior to the adoption of the Constitution by the States in 1789. The Constitution's framers sought to and did eliminate the barriers to freedom of movement across state borders, which had been erected earlier by the States. They accomplished their objective by giving exclusive power to the Congress to "regulate Commerce with foreign Nations, and among the several States" in the interstate commerce clause. *Gibbons* v. *Ogden* (1824), 9 Wheat. (U.S.) 1, 6 L.Ed. 23; *Hood* v. *DuMond* (1949), 336 U.S. 525, 533-535, 93 L.Ed. 865, 871-878.

Since *Cooley* v. *Board of Port Wardens* (1851), 12 How. (U.S.) 299, it has been manifest that the interstate commerce clause of the Constitution does not, perforce, preclude all regulation by a State of movement across its

borders. See, for example, *South Carolina State Highway Department* v. *Barnwell Bros.* (1938), 303 U.S. 177; *California* v. *Thompson* (1941), 313 U.S. 109; *Kane* v. *New Jersey* (1916), 242 U.S. 160; *Hess* v. *Pawloski* (1927), 274 U.S. 352; *Hendrick* v. *Maryland* (1915), 235 U.S. 610; *Capitol Greyhound Lines* v. *Brice* (1950), 339 U.S. 542; and *Fry Roofing Co.* v. *Wood* (1952), 344 U.S. 157.

However, a State's regulatory power in the premises has recognized limits. It may not be invoked to exact a tax for the privilege of doing interstate business. *Spector Motor* [fol. 84] *Service* v. *O'Connor* (1951), 340 U.S. 602, 608-609. The State can not levy a tax "upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself." *Memphis Natural Gas Co.* v. *Stone* (1948), 335 U.S. 80, 88-89. It is especially obnoxious for a State to attempt to exercise its regulatory power in a manner to protect its local economy from the effect of interstate commerce. *Buck* v. *Kuykendall* (1925), 267 U.S. 307; *Bush* v. *Maloy* (1925), 267 U.S. 317; *Baldwin* v. *Seelig* (1935), 294 U.S. 511; *Hood* v. *DuMond, supra.*

In *Baldwin* v. *Seelig, supra,* the Supreme Court of the United States, explaining the basic purposes of the interstate commerce clause of the Constitution, pointedly stated (294 U.S. 527):

> "* * * *. What is ultimate is the principle that one state in its dealings with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this overmastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog upon the mobility of commerce. They set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. * * * *."

[fol. 85] To the same effect, see *Freeman* v. *Hewitt* (1946), 329 U.S. 249, 254, and *McLeod* v. *Dilworth Co.* (1944), 322 U.S. 327, 330-331.

The Illinois use tax may be imposed on the user within the State, even though the sale to such user is not, *per se*, subject to tax. *Henneford* v. *Silas Mason Co., supra.* However, the problem is this case involves not Illinois' power to tax the user, but its power to impose the tax on the vendor, defendant herein. Where, as here, such vendor is not qualified to do business in Illinois and engages in no activities in the State except its interstate mail order business, Illinois can not impose on defendant a liability for the use tax, which admittedly the State may properly collect from Illinois vendees. No case can be cited to support so broad an exercise of State power.

It is clear, beyond a peradventure of doubt, that defendant, as a non-resident vendor which confined its activities strictly to Missouri, could not be made liable for the Illinois use tax. If defendant were to cease making deliveries, by mail or otherwise, to its vendees, manifestly Illinois could not assert a right to hold defendant liable for use taxes, even though such vendees used the purchases in Illinois. Accordingly, the Missouri vendor, who makes no deliveries across state lines, is immune. In sum, the Illinois use tax can be avoided by defendant herein by the mere expedient of not engaging in interstate commerce. It [fol. 86] is that very suppression if interstate movement that the use tax was designed to achieve and the interstate commerce clause was fashioned to prevent. The Constitution of the United States prohibits the State of Illinois from conditioning the use of the mails or any other channel of interstate commerce in the manner and by the means attempted herein.

Defendant's objection to paying the Illinois use tax herein is based both on its burdensome effect and on its invalidity as a direct tax on interstate commerce. In such circumstances, the amount of the tax is immaterial. *Spector Motor Service* v. *O'Connor* (1951), 340 U.S. 602, 608-

609. As Mr. Justice Frankfurter observed in *Memphis Natural Gas Co.* v. *Stone, supra,* in his dissent therein (335 U.S. 103-104):

> "Of course, a State tax on interstate commerce does not become a valid one merely because 'it's only a little one.' * * * ."

However, it is fact that the Illinois Use Tax Act lays a heavy burden on the vendor. See, for example, Sections 8, 11, 12, and 14 of such Act (120 S.H.A., §§439.8, 439.11, 439.12, and 439.14) and also the several Sections of the Illinois Retailer's Occupation Tax Act, which are set forth in Section 12 of the Use Tax Act and are made applicable thereby to a vendor subject to the use tax.

[fol. 87] (j) The attempted imposition of the Illinois use tax on defendant herein also is invalid, because it is repugnant to and violates the due process clause of the 14th Amendment of the Constitution of the United States (U.S. Const., 14th Amend., §1). To hold defendant liable for collection of the Illinois use tax in the attendant circumstances would be without precedent. The analogy of *Norton Company* v. *Department of Revenue of the State of Illinois* (1951), 340 U.S. 534, 95 L.Ed. 517, offers instruction in the premises. In that case, the Supreme Court of the United States held that Illinois had no power to include within the measure of its gross receipts tax, that is, its retailer's occupation tax, the proceeds of orders sent directly by Illinois customers to the vendor's Massachusetts home office, from which the ordered goods were shipped directly to such customers. The Supreme Court did hold that Illinois could include within the measure of such tax the proceeds of sales that used the vendor's Illinois place of business to receive orders or to distribute goods. It rejected the minority's argument that all proceeds of the vendor's sales in Illinois could reasonably be attributed to its local activities in the State. Clearly, defendant's activities with regard to Illinois are too remote

and insufficient to meet the due process requirements for valid imposition of the Illinois use tax upon it.

[fol. 88] It is indisputable that the State of Illinois has ample authority to collect its use tax from its own residents. Manifestly, for its own convenience, it has seen fit to reject its own efforts to collect such tax in the situation herein and, in lieu thereof, to seek to impose its own burden, unconscionably and without warrant in fact or in law, on non-resident vendors, such as defendant, transacting interstate commerce only. In the circumstances herein, there is basically the "impotence of state power", which, the Supreme Court of the United States emphasized in *Wisconsin* v. *J. C. Penney Co.* (1941), 311 U.S. 435, 444, stems from the Constitution of the United States. As in that case, it is clear herein that, with "the limits on the otherwise autonomous powers of the states" set forth in the Constitution, the "state power has nothing on which to operate" (*Wisconsin* v. *J. C. Penney Co., idem*).

Dated: June 19, 1964

Leibman, Williams, Bennett and Baird, By: Julian R. Wilheim, Attorneys for Defendant National Bellas Hess, Incorporated, 208 South LaSalle Street, Chicago 4, Illinois, FInancial 6-2200.

[fol. 89]

IN THE CIRCUIT COURT OF COOK COUNTY

ILLINOIS COUNTY DEPARTMENT

TAX DIVISION

General No. 63C21015

DEPT. OF REVENUE, ETC.

v.

NATIONAL BELLAS HESS, INC.

ORDER DENYING MOTION TO STRIKE OR DISMISS—
June 23, 1964

This cause having come on to be heard by this Court on the Motion of Defendant National Bellas Hess, Incorporated to Strike or Dismiss Complaint, and plaintiff and defendant having appeared by their respective attorneys, and the Court having been advised in the premises

It Hereby Is Ordered that:

(1) The Motion of Defendant National Bellas Hess, Incorporated to Strike or Dismiss Complaint, filed herein on June 19, 1964, be, and the same hereby is, denied; and

(2) Such defendant be, and it hereby is, granted leave to and including July 23, 1964, within which to answer the Complaint herein.

Enter:

William V. Brothers, Judge.

[File endorsement omitted]

[fol. 90]

IN THE CIRCUIT COURT OF COOK COUNTY

ILLINOIS COUNTY DEPARTMENT

TAX DIVISION

[Title omitted]

ANSWER TO COMPLAINT—Filed July 22, 1964

Now comes defendant National Bellas Hess, Incorporated, by its attorneys, Leibman, Williams, Bennett and Baird, appearing herein pursuant to the Court's Order of May 20, 1964 and without waiver of or prejudice to defendant's right to persist in and maintain its objection to the Court's jurisdiction over its person, and, by way of answer to the complaint herein and without waiver of or prejudice to defendant's exception to the Court's Order of June 23, 1964, denying its motion to strike or dismiss complaint filed herein on June 19, 1964, alleges, as follows:

First Defense

1. The complaint fails to state a claim or a cause of action, upon which relief can be granted by this Court.

[fol. 91]

Second Defense

1. As to the allegations contained in paragraph (1) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant admits that, from on or about August 1, 1955 to on or before the date of the filing of the complaint herein, *viz.*, on or before October 15, 1963, it was engaged, on a national basis, in business in the United States solely as a mail order vendor; admits that, during such period and in the course of such business, it issued, annually, two catalogues and also certain sales

books and flyers, which it disseminated, via the United States mails only, to its vendees and potential vendees; specifically denies that, during such period or any other period whatsoever or in the course of such business or in any other manner whatsoever, it was engaged in soliciting orders in the State of Illinois from users or anyone else whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

Further, by way of answer to paragraph (1) of the complaint, defendant alleges that:

(a) Defendant has been, at all times material herein, and still is a corporation, organized and existing under the laws of the State of Delaware;

[fol. 92] (b) Defendant's sole place of business has been, at all times material herein, and still is in the State of Missouri;

(c) Defendant has, at all times material herein, qualified and now is qualified to do business only in its state of incorporation, that is, the State of Delaware, and in the State of Missouri;

(d) Defendant has, at all times material herein, done and now is doing business only in the State of Missouri;

(e) Defendant has not, at any time material herein, had or maintained and now does not have or maintain within the State of Illinois, directly or by subsidiary or in any other manner whatsoever, any office;.

(f) Defendant has not, at any time material herein, had or maintained and now does not have or maintain within the State of Illinois, directly or by subsidary or in any other manner whatsoever, any distribution house;

(g) Defendant has not, at any time material herein, had or maintained and now does not have or maintain within the State of Illinois, directly or by subsidiary or in any other manner whatsoever, any sales house;

(h) Defendant has not, at any time material herein, had or maintained and now does not have or maintain within [fol. 93] the State of Illinois, directly or by subsidiary or in any other manner whatsoever, any warehouse;

(i) Defendant has not, at any time material herein, had or maintained and now does not have or maintain within the State of Illinois, directly or by subsidiary or in any other manner whatsoever, any other place of business;

(j) Defendant has not, at any time material herein, had or maintained and now does not have or maintain any agent operating within the State of Illinois under defendant's authority or a subsidiary's authority or in any other manner whatsoever;

(k) Defendant has not, at any time material herein, had or maintained and now does not have or maintain any other representative operating within the State of Illinois under defendant's authority or a subsidiary's authority or in any other manner whatsoever;

(l) Insofar as the Illinois Use Tax Act is construed by plaintiff or anyone else to be applicable, at any time material herein or now, to defendant, such Illinois Use Tax Act violates and is repugnant to the Constitution of the United States, especially, Article I, Section 8, clause 3; Article I, Section 8, clause 7; Article I, Section 10, clause 1; Article I, Section 10, clause 3; and Amendment XIV, Section 1;

[fol. 94] (m) Insofar as the Illinois Use Tax Act is construed by plaintiff or anyone else to be applicable, at any time material herein or now, to defendant, such Illinois Use Tax Act violates and is repugnant to the Constitution of Illinois, especially, Article II, Section 2; Article II, Section 13; and Article II, Section 14;

(n) Insofar as plaintiff's Rules under the Illinois Use Tax Act are construed by plaintiff or anyone else to be applicable, at any time material herein or now, to defendant,

such Rules violate and are repugnant to the Constitution of the United States, especially, Article I, Section 8, clause 3; Article I, Section 8, clause 7; Article I, Section 10, clause 1; Article I, Section 10, clause 3; and Amendment XIV, Section 1; and

(o) Insofar as plaintiff's Rules under the Illinois Use Tax Act are construed by plaintiff or anyone else to be applicable, at any time material herein or now, to defendant, such Rules violate and are repugnant to the Constitution of Illinois, especially, Article II, Section 2; Article II, Section 13; and Article II, Section 14.

2. As to the allegations contained in paragraph (2) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not [fol. 95] require answer; but, insofar as they may be deemed to be material allegations of fact, defendant specifically denies that Chapter 120—Revenue, Section 439:2 of the Use Tax Act, as amended, of the Illinois Revised Statutes, which Act is entitled "An Act in relation to a tax upon the privilege of using tangible personal property in this State", or any other provision of such Act has been, at any time material herein, or now is applicable to defendant; specifically denies that it was, at any time material herein, or now is defendant's duty or obligation to pay to plaintiff or any other agency of the State of Illinois, at any rate whatsoever or in any amount whatsoever, any tax provided or specified in such Illinois Use Tax Act or in any other statute whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

(3) As to the allegations contained in pafagraph (3) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant admits that it has been, at all times material herein, and still is a corporation organized and existing under the laws of the State

of Delaware; admits that its sole place of business has been, at all times material herein, and still is in the State of Missouri; specifically denies that it has had, at any time [fol. 96] material herein, or now has any place of business whatsoever in the State of Illinois; specifically denies that the Department of Revenue of the State of Illinois or any other agency of such State has issued, at any time material herein, or now is issuing to defendant, pursuant to applicable provisions of the Illinois Use Tax Act or any other statute whatsoever, a certificate of Registration, number 953 777, or any other certificate whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

(4) As to the allegations contained in paragraph (4) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant admits that it was, at all times material herein, and still is engaged, on a national basis, in business in the United States solely as a mail order vendor; admits that, during such times, it issued, annually, and still issues, annually, two catalogues and also certain sales books and flyers, which it disseminated and still disseminates, via the United States mails only, to its vendees and potential vendees; specifically denies that, during such times or any other time whatsoever or in the course of such business or in any other manner whatsoever, it was or now is engaged in soliciting orders in the State of Illinois from users or anyone else [fol. 97] whatsoever; specifically denies that Section 3 of the Illinois Use Tax Act or any other provision of such Act has been, at any time material herein, or now is applicable to defendant; specifically denies that it was, at any time material herein, or now is defendant's duty or obligation, under Section 3 of the Illinois Use Tax Act or any other provision of such Act, under any other statute whatsoever, or for any other reason whatsoever, to file a

return with plaintiff or any other agency of the State of Illinois in the form or substance described in paragraph (4) of the complaint or in any other form or substance whatsoever; specifically denies that it was, at any time material herein, or now is defendant's duty or obligation, under Section 3 of the Illinois Use Tax Act or any other provision of such Act, under any other statute whatsoever, or for any other reason whatsoever, to pay to plaintiff or any other agency of the State of Illinois any tax provided or specified in such Illinois Use Tax Act or in any other statute whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

5. As to the allegations contained in paragraph (5) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant specifically denies that the Illinois Use Tax Act has been, at any time material herein, or now is applicable to defendant; specifically [fol. 98] denies that plaintiff or any other agency of the State of Illinois has, at any time material herein, determined, in accordance with such Illinois Use Tax Act or any other statute whatsoever, any amount of any tax due and owing from defendant to plaintiff or any other agency of the State of Illinois; specifically denies that the purported Notice of Proposed Assessment, to which reference is made in paragraph (5) of the complaint and which, unmarked, is attached to the complaint, was issued by plaintiff or any other agency of the State of Illinois in accordance with such Illinois Use Tax Act or any other statute whatsoever; specifically denies that such purported Notice of Proposed Assessment is predicated on the best judgment and information or any other adequate judgment and information of plaintiff or any other agency of the State of Illinois; admits that, for the period designated in such purported Notice of Proposed Assessment, *viz.*, from July 17, 1961 through October 31, 1962, defendant filed no return under

such Illinois Use Tax Act with plaintiff or any other agency of the State of Illinois; admits that, on or about January 21, 1963, plaintiff sent, via United States registered mail, to defendant, and defendant received, via such mail, from plaintiff, a purported copy of such purported Notice of Proposed Assessment; alleges that defendant does not have sufficient knowledge or information to form a belief regarding the allegation that, on January 21, 1963, [fol. 99] plaintiff delivered to the Secretary of State of the State of Illinois, and such Secretary of State received from plaintiff, a purported copy of such purported Notice of Proposed Assessment and, accordingly, denies such allegation; specifically denies that defendant has been, at any time material herein, or now is a taxpayer of the State of Illinois pursuant to such Illinois Use Tax Act or any other statute whatsoever; specifically denies that the Secretary of State of the State of Illinois or anyone else in such State has been, at any time material herein, or now is defendant's agent pursuant to such Illinois Use Tax Act or any other statute whatsoever; specifically denies that such Secretary of State or anyone else in such State has been, at any time material herein, or now is defendant's agent for service of notices and legal process or for any other purpose whatsoever; specifically denies that, on or about January 21, 1963 or any other date whatsoever, defendant owed and was delinquent in paying to the State of Illinois, for the period designated in such purported Notice of Proposed Assessment or any other period whatsoever, the sum of $74,593.75 or any other sum whatsoever for use tax or any other reason whatsoever; specifically denies that, on January 21, 1963 or any other date whatsoever, defendant owed and was subject to paying to the State of Illinois, for the period designated in such purported Notice of Proposed Assessment or any other period [fol. 100] whatsoever, the sum of $18,648.43 or any other sum whatsoever for penalty for use tax or any other reason whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

6. As to the allegations contained in paragraph (6) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant specifically denies that the Illinois Use Tax Act and plaintiff's purported Rules thereunder have been, at any time material herein, or now are applicable to defendant; specifically denies that plaintiff or any other agency of the State of Illinois has, at any time material herein, determined, in accordance with such Illinois Use Tax Act or any other statute whatsoever, any amount of any tax due and owing from defendant to plaintiff or any other agency of the State of Illinois; specifically denies that the purported Notice of Proposed Assessment, to which reference is made in paragraph (6) of the complaint and which, unmarked, is attached to the complaint, was issued by plaintiff or any other agency of the State of Illinois in accordance with such Illinois Use Tax Act or any other statute whatsoever; admits that defendant has not, at any time material herein, responded, by way of protest and by way of request for hearing to plaintiff, to such purported Notice of Proposed Assessment; [fol. 101] specifically denies that plaintiff has made, at any time material herein and in accordance with such Illinois Use Tax Act or any other statute whatsoever, a Final Assessment of tax and penalties owed by defendant to plaintiff in the sum of $93,242.18 or any other sum whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

7. As to the allegations contained in paragraph (7) of the complaint, defendant alleges that they are argumentative and are conclusions of law and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant specifically denies that the Illinois Use Tax Act has been, at any time material herein, or now is applicable to defendant; specifically denies that plaintiff or any other agency of the State of Illinois

has, at any time material herein, determined, in accordance with such Illinois Use Tax Act or any other statute whatsoever, any amount of any tax due and owing from defendant to plaintiff or any other agency of the State of Illinois; specifically denies that the purported Final Assessment, to which reference is made in paragraph (7) of the complaint and which, unmarked, is attached to the complaint, was issued by plaintiff or any other agency of the State of Illinois in accordance with such Illinois Use Tax Act or any other statute whatsoever; specifically denies that such purported Final Assessment is predicated on the best judg- [fol. 102] ment and information or any other adequate judgment and information of plaintiff or any other agency of the State of Illinois; admits that, on or about June 26, 1963, plaintiff sent, via United States registered mail, to defendant, and defendant received, via such mail, from plaintiff, a purported copy of such purported Final Assessment; alleges that defendant does not have sufficient knowledge or information to form a belief regarding the allegation that, on June 26, 1963, plaintiff delivered to the Secretary of State of the State of Illinois, and such Secretary of State received from plaintiff, a purported copy of such purported Final Assessment and, accordingly, denies such allegation; specifically denies that defendant has been, at any time material herein, or now is a taxpayer of the State of Illinois pursuant to such Illinois Use Tax Act or any other statute whatsoever; specifically denies that the Secretary of State of the State of Illinois or anyone else in such State has been, at any time material herein, or now is defendant's agent pursuant to such Illinois Use Tax Act or any other statute whatsoever; specifically denies that such Secretary of State or anyone else in such State has been, at any time material herein, or now is defendant's agent for service of notices and legal process or for any other purpose whatsoever; specifically denies that, on or about June 26, 1963 or any other date whatsoever, defendant owed and was delinquent in paying to the State of

[fol. 103] Illinois, for the period designated in such purported Final Assessment or any other period whatsoever, the sum of $74,593.75 or any other sum whatsoever for use tax or any other reason whatsoever; specifically denies that, on or about June 26, 1963 or any other date whatsoever, defendant owed and was subject to paying to the State of Illinois, for the period designated in such purported Final Assessment or any other period whatsoever, the sum of $18,648.43 or any other sum whatsoever for penalty for use tax or any other reason whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

8. As to the allegations contained in paragraph (8) of the complaint, defendant alleges that they are vague and ambiguous and are argumentative and, accordingly, do not require answer; but, insofar as they may be deemed to be material allegations of fact, defendant specifically denies that the Illinois Use Tax Act has been, at any time material herein, or now is applicable to defendant; specifically denies that plaintiff or any other agency of the State of Illinois has, at any time material herein, determined, in accordance with such Illinois Use Tax Act or any other statute whatsoever, any amount of any tax due and owing from defendant to plaintiff or any other agency of the State of Illinois; specifically denies that, on or about June 26, 1963 or any other date whatsoever, defendant owed to plaintiff, on account of the purported Final Assessment, to which [fol. 104] reference is made in paragraph (7) of the complaint and which, unmarked, is attached to the complaint, or for any other reason whatsoever, the sum of $93,242.18 or any other sum whatsoever; admits that defendant has not paid to plaintiff any part of the sum of $93,242.18 set forth in such purported Final Assessment; specifically denies that defendant has owed, at any time material herein, or now owes to plaintiff the sum of $93,242.18 or any other sum whatsoever; and, except as so admitted, qualified, or denied, denies such allegations.

9. Defendant denies, generally and specifically, each and every material allegation of fact contained in the complaint not hereinbefore admitted, qualified, or denied.

Wherefore, defendant prays the Court for entry of judgment herein dismissing plaintiff's complaint, with prejudice; and awarding costs to defendant.

Leibman, Williams, Bennett and Baird, By Julian R. Wilheim, Attorneys for Defendant National Bellas Hess, Incorporated, 208 South LaSalle Street, Chicago 4, Illinois, FInancial 6-2200.

[fol. 105] Verification (omitted in printed).

[fol. 106] Certificate of Service (omitted in printing).

[fol. 111]

IN THE CIRCUIT COURT OF COOK COUNTY

[Title omitted]

MOTION OF PLAINTIFF FOR SUMMARY JUDGMENT, ETC.—Filed December 15, 1964

Now come Harry L. Hulman, Successor Director of Revenue of the Department of Revenue of the State of Illinois, by William G. Clark, Attorney General of the State of Illinois, and moves this Court to enter a Summary Judgment or in alternative Judgment on the pleadings in favor of plaintiff in the above entitled cause, and to request an order to postpone all depositions in this cause, until the further order of Court, and in support of this motion the said plaintiff files an affidavit herewith attached to and made a part hereof.

William G. Clark, Attorney General, of the State of Illinois, Attorney for defendants.

[fol. 112]

AFFIDAVIT IN SUPPORT OF MOTION

State of Illinois,
County of Cook, ss.:

Harry L. Hulman, Director of Revenue of the Department of Revenue in the State of Illinois, being first duly sworn upon oath, deposes and says that he is the Director of Revenue of the Department of Revenue of the State of Illinois, and duly authorized to execute this Affidavit and that he has knowledge of the facts in this cause and that he has read the Affidavit and Answer of the defendants herein, and knows and understands the contents thereof;

Affiant, in support of said motion for summary judgment states:

(1) the answer fails to state any legal defenses, in law, in equity, or otherwise;

(2) that from the answer filed herein by the defendant and the admissions as to the receipt of the proposed assessment and the final assessment by the defendant, and its failure to assert the remedies available under the Retailers' Occupation Tax Act, the Use Tax Act, and the Administrative Review Act, that there is no genuine issue raised by the Answer as to any material fact;

(3) that it affirmatively appears on the face of defendant's Answer that the decision of Department of Revenue versus Downstate Coal Company, 11 Illinois 2nd 317, 1957, is controlling: The following language is pertinent in support of plaintiff's motion herein:

> [fol. 113] "when a taxpayer raises questions as to the period of time covered by assessments for the first time in answer to suit by the Department of Revenue for collection of the retailers' occupation tax, any question of law or fact concerning an assessment is raised too

late, since such matters could have been raised by administrative review. If the assessment was not proper or regular, the taxpayer should have, within the time provided, protested the assessment, and the Department of Revenue would have set a hearing on the matter. If the taxpayer is not satisfied, there is provision for judicial review of the determination. Department of Finance v. Sinclair, 382 Ill.118".

Harry L. Hulman, Deponent.

Subscribed and sworn to before me this 14th day of December A. D. 1964.

Mildred Harris, Notary Public, my commission expires: 8-21-65.

[fol. 115]

IN THE CIRCUIT COURT OF COOK COUNTY

[Title omitted]

AFFIDAVIT IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT—Filed January 25, 1965

State of Illinois,
County of Cook, ss.:

William G. Clark, being first duly sworn on his oath deposes and says that he is the Attorney General of the State of Illinois and that he is the duly authorized agent in this behalf for the Department of Revenue of the State of Illinois, the plaintiff herein and that he has full knowledge of the facts in this cause and that he has read the Answer of the defendant herein, and knows and understands the contents thereof.

Affiant, in support of said motion for summary judgment states as follows:

(1) the answer fails to state any legal defenses, in law, in equity, or otherwise;

(2) that from the answer filed herein by the defendant and the admissions as to the receipt of the proposed assessment and the final assessment by the defendant, and its failure to assert the remedies available under the Retailers' [fol. 116] Occupation Tax Act, the Use Tax Act, and the Administrative Review Act, that there is no genuine issue raised by the Answer as to any material fact;

(3) that it affirmatively appears on the face of defendant's Answer that the decision of Department of Revenue versus Downstate Coal Company, 11 Illinois 2nd 317, 1957, is controlling: The following language is pertinent in support of plaintiff's motion herein:

> "when a taxpayer raises questions as to the period of time covered by assessments for the first time in answer to suit by the Department of Revenue for collection of the retailers' occupation tax, any question of law or fact concerning an assessment is raised too late, since such matters could have been raised by administrative review. If the assessment was not proper or regular, the taxpayer should have, within the time provided, protested the assessment, and the Department of Revenue would have set a hearing on the matter. If the taxpayer is not satisfied, there is provision for judicial review of the determination. Department of Finance v. Sinclair, 382 Ill.118".

Wherefore affiant prays that judgment be entered herein for the plaintiff and against the defendant, and costs.

William G. Clark, Deponent.

Subscribed and sworn to before me this 22nd day of January A.D. 1965.

(Illegible), Notary Public, my commission expires:

[fol. 186]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, TAX DIVISION

[Title omitted]

AFFIDAVIT OF MERITS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT—Filed March 2, 1965

State of New York,
County of New York, ss.:

George Marks, being first duly sworn, upon oath deposes and says, that he is an officer, to wit, a Vice-President, and duly authorized agent of National Bellas Hess, Inc., defendant herein, and has knowledge of the contents of this affidavit; that affiant is authorized to make this affidavit, and that affiant, if sworn as a witness, can testify competently to the facts herein set forth. Affiant, in opposition to plaintiff's motion for summary judgment, states as follows:

1. Defendant National Bellas Hess, Inc. is a corporation, organized under the laws of the State of Delaware, and duly qualified to do business in the State of Missouri.

2. That it has a good defense on the merits to all of plaintiff's claims herein.

3. That the nature of defendant's defense follows:

4. As already noted, National Bellas Hess, Inc. is a Delaware corporation. It is duly qualified to do business, does business, and its sole place for the doing of business is within the State of Missouri.

5. National Bellas Hess, Inc. is a national mail order [fol. 187] company which issues a number of catalogs during the year. There are issued annually two main catalogs ("Spring & Summer"; and "Fall & Winter") and a number of intermediate smaller "sales books", or "flyers". Catalogs, sales books and flyers are disseminated to customers and

potential customers solely and entirely through the use of the United States mails.

They are mailed only, always, from North Kansas City, Missouri, and none from any point in Illinois. They are not shipped by truck or otherwise to any other mailing point, as some companies do.

6. National Bellas Hess, Inc. has not qualified or registered to do business in Illinois; nor, in fact, in any state other than Delaware and Missouri.

7. It has no registered agent in Illinois, and has not authorized any person to act as its agent, either to receive process, or accept service, or apply for, receive or accept any licenses or permits, in Illinois.

8. The company's only plants are located in North Kansas City, and all its mail order activities are carried on there, except for purchasing, which is done in the first instance by a wholly owned New York subsidiary, in New York City; and no activities, of this or any nature, are carried on in Illinois.

9. The company's catalogs present a wide variety of merchandise, at retail. A main catalog contains approximately 4000 different items, and is mailed to the company's own list of customers, maintained by it in Kansas City, and not in Illinois. This list was originally acquired from a predecessor company in 1932, and then consisted of about 5,000,000 names. As time goes on, and customers fail to order, their names are weeded out. As new customers are secured, their names are added. A "Catalog" (using this designation for one of the two main books, to distinguish [fol. 188] it from all other smaller books, hereafter referred to as "flyers") is too costly to distribute casually, or carelessly. It is usually sent only to active, recent customers, who have ordered a minimum amount of merchandise within a specified time, and is mailed to customers by name, from their stencils, though of course a request for a catalog from

a new name will be complied with. Flyers are also mailed thus, but to a less restricted list. They may also occasionally be mailed in bulk, or addressed to "occupant" (here the local postmaster delivers as indicated) or, as is more usual, enclosed in the parcels sent to customers in filling orders from a prior flyer or catalog. In any case, it will be noted, the mails are employed; and the mailing is from the only location where the company has warehouses and assembly and distribution points, to wit—North Kansas City, Missouri; and not from or in Illinois.

10. Thus the only warehouses the company maintains from which sales to customers including Illinois residents are filled are all located in North Kansas City. Goods are shipped by the cheapest available method of transportation, which in most cases is mail, but occasionally it could be railway express for a bulky item or for one which is too large for the receiving post office to handle. If a customer should specify any particular method of shipment, it would be followed if possible. However no goods are shipped by other than common carrier.

11. The company itself has no trucks delivering in Illinois, or anywhere else, for that matter.

12. Orders from customers are received only in its office, plant and warehouse in North Kansas City, Missouri and in no other location, and all normal correspondence in connection with such orders with customers, the review and acceptance of such orders are made from one of its warehouses and plants in Kansas City.

[fol. 189] 13. The company does not maintain, keep or use, nor has it ever in the past maintained, kept or used, permanently or temporarily, directly or indirectly, or through any agent, any office, branch, distribution depot, sales or sample room, warehouse or storage place in Illinois.

14. The defendant does not have nor has it ever had any employees, representative, agent, salesman, independ-

ent contractor, canvasser or solicitor operating in the State of Illinois for the purpose of soliciting, selling or taking orders for tangible personal property, or delivering the same, or accepting payments or servicing any of the products it sold.

15. It owns no tangible property in the State of Illinois whether realty or personalty.

16. It owns no motor vehicles in the State of Illinois, nor does it hold any licenses for motor vehicles in the State of Illinois.

17. It does not prepare or supply any advertising displays for use in Illinois and does not advertise its products for sale in newspapers, billboards, radio or TV within the State of Illinois.

18. It has brought no suits in the State of Illinois.

19. Payment for merchandise bought by residents of Illinois is made either by cash or check sent by the customer to National Bellas Hess, Inc., at North Kansas City, Missouri, when the order is mailed, or when on C.O.D. orders payment is made to the postal employee when the merchandise is delivered; if merchandise is ordered on credit the merchandise is paid for by cash or check mailed by the customer to North Kansas City, Missouri, in one sum or in installments in accordance with the provisions of the purchase agreement. Payment for merchandise purchased by Illinois residents by mail order is never made to National Bellas Hess, Inc., in Illinois nor to any agent, em- [fol. 190] ployees, salesman, or representative of any kind of National Bellas Hess, Inc., in Illinois.

20. In summary, and additionally:—National Bellas Hess, Inc. has never—

a. Qualified to do business in Illinois or appointed any agent for the service of process on National Bellas Hess, Inc., in Illinois.

b. Maintained, either by ownership or rental of property, or otherwise, a place of business in Illinois.

c. Maintained, occupied or used in Illinois any office, branch, place of distribution, sales or sample rooms or places for sale, warehousing or storage of goods.

d. Owned any trucks or vehicles in Illinois, or applied for licenses therefor.

e. Had any officers, agents, employees, salesmen, servicemen or organization, or "independent contractors" performing services for it in Illinois.

f. Had any tangible property, real or personal, in Illinois.

g. Solicited or promoted sales or received purchases, or orders through agents or salesmen or any other person, whether or not an agent or employee of National Bellas Hess, Inc., in Illinois.

h. Advertised its merchandise for sale in any newspaper or periodical published in Illinois.

i. Repossessed by legal proceedings any merchandise sold to customers in Illinois.

j. Instituted an action in any court in Illinois.

k. Delivered merchandise personally to residents of Illinois or by truck of its own ownership or other private carrier.

l. Had any telephone listing in Illinois.

[fol. 191] 21. The receipt of mail orders from Illinois residents as described above constitutes the only activity of any kind conducted by the company in or with respect to the State of Illinois or its residents. Affiant alleges that the company is neither a taxpayer nor a collector of use taxes within the meaning and scope of the Illinois Use Tax Law.

Wherefore, affiant says that defendant National Bellas Hess, Inc. is entitled to defend the said action and prays that plaintiff's motion for summary judgment shall be dismissed by the Court.

George Marks, Affiant.

Subscribed and sworn to before me, a Notary Public, in and for the County and State aforesaid, this 29th day of January, A.D. 1965.

Rose Crystal, Notary Public, State of New York, No. 24-587110, Certified in Kings County, Cert. filed in New York County, Commission Expires March 30, 1966.

[fol. 192]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, TAX DIVISION

[Title omitted]

AFFIDAVIT OF MERITS IN OPPOSITION TO MOTION FOR SUMMARY JUDGMENT

State of Missouri,
County of Clay, ss.:

William O. Campbell, being first duly sworn, upon oath deposes and says, that he is an officer, to wit, a Vice-President, and duly authorized agent of National Bellas Hess, Inc., defendant herein, and has knowledge of the contents of this affidavit; that affiant is authorized to make this affidavit, and that affiant, if sworn as a witness, can testify competently to the facts herein set forth. Affiant, in opposition to plaintiff's motion of summary judgment, states as follows:

1. Defendant National Bellas Hess, Inc. is a corporation, organized under the laws of the State of Delaware, and duly qualified to do business in the State of Missouri.

2. That it has a good defense on the merits to all of plaintiff's claims herein.

3. The nature of defendant's defense is fully set forth in the affidavit of George Marks, sworn to the 29th day of January, 1965, which affidavit your affiant has read. Your affiant herewith corroborates the said affidavit and the facts therein set forth, avers that it is true, and that if sworn as a witness affiant can testify competently to the facts herein and therein set forth.

[fol. 193] Wherefore, affiant says the defendant National Bellas Hess, Inc. is entitled to defend the said action and prays that plaintiff's motion for summary judgment shall be dismissed by the Court.

William O. Campbell, Affiant.

Subscribed and sworn to before me, a Notary Public, in and for the County and State aforesaid, this 1st day of February, A.D. 1965.

Teresa Handley, Notary Public.

My Commission Expires: April 30, 1967.

[fol. 196]

IN THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

COUNTY DEPARTMENT, TAX DIVISION

At Law

No. 63 C 21015

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Plaintiff,

v.

NATIONAL BELLAS HESS, INCORPORATED, Defendant.

ORDER AND JUDGMENT—March 10, 1965

This cause having come on to be heard on plaintiff's motion for summary judgment; on defendant's motion to strike plaintiff's affidavits in support of plaintiff's motion for summary judgment or, in the alternative, to deny plaintiff's motion for summary judgment and for the imposition of expenses on plaintiff pursuant to section 57(5), Illinois Civil Practice Act; and on defendant's renewed oral motion for issuance of subpoenas for and the testimony herein of Harry L. Hulman, Director of Revenue, State of Illinois; of William G. Clark, Attorney General, State of Illinois; and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois, and the parties having appeared by their respective at-
[fol. 197] torneys herein, and the Court having been fully advised in the premises,

It Hereby Is Ordered that:

(1) Defendant's renewed oral Motion of March 8, 1965 herein for issuance of subpoenas for and the taking herein of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois; of William G. Clark, Attorney General,

State of Illinois; and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois, be, and the same hereby is, denied;

(2) Defendant's Motion to Strike Plaintiff's Affidavits in Support of Plaintiff's Motions for Summary Judgment or, in the alternative, to Deny Plaintiff's Motion for Summary Judgment and for the Imposition of Expenses on Plaintiff pursuant to Section 57(5), Illinois Civil Practice Act, served on February 18, 1965 and filed herein on February 23, 1965, be, and the same hereby is, denied;

(3) Plaintiff's Motion for Summary Judgment, served on December 11, 1964 and filed herein, by leave of the Court first had and obtained, on January 27, 1965, be, and the same hereby is, granted;

(4) Judgment be, and the same hereby is, granted, for plaintiff and against defendant, in the sum prayed in the [fol. 198] Complaint herein, sworn by Harry L. Hulman, Director of Revenue, State of Illinois, on October 11, 1963 and filed herein on October 15, 1963, that is, the sum of $93,242.18, representing taxes of $74,593.75, assessed, under the Illinois Use Tax Act, by plaintiff against defendant for the period of July 17, 1961 through October 31, 1962, plus penalties of $18,648.43 thereon;

Enter: William V. Brothers, Judge.

Leibman, Williams, Bennett and Baird, Attorneys for Defendant, 208 South La Salle Street, Chicago 4, Illinois, FInancial 6-2200.

[fol. 199]

APPEAL TO THE SUPREME COURT OF ILLINOIS FROM THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS

[Title omitted]

NOTICE OF APPEAL—Filed April 7, 1965

To: William G. Clark, Esq., Attorney General, State of Illinois, Attorney for Plaintiff, 160 North LaSalle Street, Chicago 1, Illinois.

Please Take Notice that defendant in the above-entitled cause, National Bellas Hess, Incorporated, appearing in the cause pursuant to the Order of May 20, 1964 of the Circuit Court of Cook County therein and without waiver of or prejudice to defendant's right to persist in and maintain its objection to the jurisdiction of the Circuit Court or any other Illinois court over its person, appeals to the Supreme Court of Illinois, pursuant to the applicable provisions of the Constitution of Illinois, as amended, of the Illinois Re-
[fol. 200] vised Statutes, as amended, and of the Illinois Supreme Court Rules, as amended, from each and every-one of the following Orders and Judgments entered by the Circuit Court in the cause:

1.) Order of May 20, 1964, denying the motion of National Bellas Hess, Incorporated to set aside and quash service of alias summons, and each and every part of such Order;

2.) Order of June 23, 1964, denying the motion of defendant National Bellas Hess, Incorporated to strike or dismiss complaint, and each and every part of such Order;

3.) Order of December 15, 1964, granting plaintiff's motion for stay of any and all depositions, including defendant's deposition, on oral examination and for discovery purposes, of plaintiff, by its Director, Harry L. Hulman, set, pursuant to required written notice, to commence on

December 17, 1964, until further order of the Circuit Court, and each and every part thereof;

4.) Order of January 27, 1965, granting plaintiff's motion for leave to file a motion for summary judgment and affidavits in support thereof, and each and every part thereof, except the third paragraph of the Order;

[fol. 201] 5.) Order of February 5, 1965, granting plaintiff's motion for leave to file motion for summary judgment and affidavit, and each and every part thereof, except paragraphs 5 and 6 of the Order;

6.) Order of February 5, 1965, granting plaintiff's motion for leave to withdraw the affidavits of Harry L. Hulman, dated December 14, 1964 and January 22, 1965, and to file a new affidavit of said Harry L. Hulman, by on or before February 16, 1965, in support of plaintiff's pending motion for summary judgment, and each and every part thereof, except paragraphs 2 and 3 of the Order;

7.) Order of February 16, 1965, granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated February 15, 1965, and each and every part thereof;

8.) Order of March 2, 1965, granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, instanter, and each and every part thereof;

9.) Order of March 10, 1965, denying defendant's motion to strike and dismiss verified complaint; granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated March 1, [fol. 202] 1965, instanter; and denying defendant's oral motion of March 2, 1965 for issuance of subpoenas for and the taking of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice

M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois, and each and every part thereof; and

10.) Order and judgment of March 10, 1965, denying defendant's renewed oral motion of March 10, 1965 for issuance of subpoenas for and the taking of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois; denying defendant's motion to strike affidavits in support of plaintiff's motion for summary judgment or, in the alternative, to deny plaintiff's motion for summary judgment and for the imposition of expenses on plaintiff pursuant to Section 57(5), Illinois Civil Practice Act; granting plaintiff's motion for summary judgment; and entering judgment, for plaintiff and against defendant, in the sum of $93,242.18, and each and every part thereof.

[fol. 203] Defendant prays for the following judgments, decrees, orders, or proceedings, by way of relief, from the Supreme Court of Illinois:

1.) A judgment and order that the purported service of alias summons and the purported alias summons in this cause, jointly and severally, are void and of no effect whatsoever and should be quashed by the Circuit Court of Cook County, because such purported service was not made in accordance with applicable Illinois statutes and the process of such Circuit Court can not and does not extend, pursuant to pertinent Illinois statutes, to defendant in the attendant circumstances;

2.) A judgment and order that the purported service of alias summons and the purported alias summons in this cause, jointly and severally, are void and of no effect whatsoever and should be quashed by the Circuit Court of Cook County, because, if such pertinent Illinois statutes are construed to apply to defendant in the attendant circumstances, such statutes, jointly and severally, are unconstitutional, pursuant to the applicable provisions of the

Constitution of Illinois, as amended, and of the Constitution of the United States, and of no force and effect whatsoever, insofar as defendant is concerned;

[fol. 204] 3.) A judgment and order that the Circuit Court of Cook County has not, at any time material in this cause, had and now does not have jurisdiction over defendant's person and remanding the cause to such Circuit Court, with directions to vacate and set aside, *in toto*, its Order of May 20, 1964, denying defendant's motion to set aside and quash service of alias summons; to enter an order in the cause granting defendant's motion, on special appearance, to set aside and quash service of alias summons, or, alternatively, to set aside and quash alias summons, and dismiss complaint; and to enter an order in the cause setting aside and quashing alias summons and dismissing the complaint, with prejudice and with costs to defendant, because, pursuant to the applicable Illinois statutes, as amended, the Constitution of Illinois, as amended, and the Constitution of the United States, the purported service of process on defendant and the purported process directed to defendant are void and of no force and effect whatsoever and such Circuit Court never acquired and now does not have any jurisdiction over defendant's person;

4.) A judgment and order that the Complaint in this cause fails to state a claim or cause of action against defendant, upon which relief can be granted by the Circuit Court of Cook County or any other court, because such Complaint [fol. 205] fails to allege, in accordance with the applicable Illinois statutes and, especially, the Illinois Civil Practice Act, sufficient material allegations of ultimate fact to state a cause of action, in law or in equity, against defendant and because, even if it is construed to contain sufficient well-pleaded allegations of ultimate fact, such Complaint fails to state a cause of action against defendant pursuant to the pertinent Illinois statutes and the applicable provisions of the Constitution of Illinois, as amended, and of the Constitution of the United States;

5.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside, *in toto*, its Order of June 23, 1964, denying defendant's motion to strike or dismiss complaint; to enter an order in the cause granting defendant's motion to strike or dismiss complaint; and to enter an order in the cause striking and dismissing the complaint, with prejudice and with costs to defendant, because such complaint fails to plead, in accordance with the applicable Illinois statutes and, especially, the Illinois Civil Practice Act, sufficient material allegations of ultimate fact to state a cause of action, in law or in equity, against defendant and because, even if [fol. 206] it is construed to contain sufficient well-pleaded allegations of ultimate fact, such complaint fails to state a cause of action against defendant pursuant to the pertinent Illinois statutes and the applicable provisions of the Constitution of Illinois, as amended, and of the Constitution of the United States;

6.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside its Order of December 15, 1964, insofar as it grants plaintiff's motion for stay of any and all depositions, including defendant's deposition, on oral examination and for discovery purposes, of plaintiff, by its Director, Harry L. Hulman, set, pursuant to required written notice, to commence on December 14, 1964, until further order of such Circuit Court, and to enter an order in the cause allowing defendant, forthwith, to take the deposition, on oral examination and for discovery purposes, of plaintiff, by its Director, Harry L. Hulman, set, pursuant to defendant's written notice of deposition of November 30, 1964, to commence on December 17, 1964, and also to take such other and further depositions and to make such other and further discovery in the cause within the pertinent provisions of the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and of the applicable Illinois [fol. 207] Supreme Court Rules, because such order of the

Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such Circuit Court's discretion and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules;

7.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside its Order of January 27, 1965, insofar as it grants plaintiff's motion for leave to file a motion for summary judgment and affidavits in support thereof, and to enter an order in the cause denying plaintiff's motion for leave to file a motion for summary judgment and affidavits in support thereof, because such Order of the Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such Circuit Court's discretion and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules;

8.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside its Order of February 5, 1965, insofar as it grants plaintiff's motion for leave to file motion for summary judgment and affidavit, and to enter an order in the [fol. 208] cause denying plaintiff's motion for leave to file motion for summary judgment and affidavit in support thereof, because such Order of the Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such Circuit Court's discretion and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules;

9.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside its Order of February 5, 1965, insofar as it grants plaintiff's motion for leave to withdraw the affidavits of Harry L. Hulman, dated December 14, 1964 and January 22, 1965, and to file a new affidavit of said Harry

L. Hulman, by on or before February 16, 1965, in support of plaintiff's pending motion for summary judgment and to enter an order in the cause denying plaintiff's motion for leave to withdraw the affidavits of Harry L. Hulman, dated December 14, 1964, and January 22, 1965, and to file a new affidavit of said Harry L. Hulman, by on or before February 16, 1965, in support of plaintiff's pending motion for summary judgment, because such Order of the Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such Circuit Court's discretion and [fol. 209] contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules;

10.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside, *in toto,* its Order of February 16, 1965, granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated February 15, 1965, and to enter an order in the cause denying plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated February 15, 1965, because such Order of the Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such Circuit Court's discretion and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act and the pertinent Illinois Supreme Court Rules;

11.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside, *in toto,* its Order of March 2, 1965, granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, instanter, and to enter an order in the cause denying plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of [fol. 210] Revenue, State of Illinois, instanter or otherwise, because such Order of the Circuit Court is, in the attendant circumstances, arbitrary, capricious, and an abuse of such

Circuit Court's discretion and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules;

12.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside, *in toto*, its Order of March 10, 1965, denying defendant's motion to strike and dismiss verified complaint; granting plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated March 1, 1965, instanter; and denying defendant's oral motion of March 2, 1965 for issuance of subpoenas for and the taking of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois, and to enter an order in the cause granting defendant's motion to strike and dismiss verified complaint; denying plaintiff's motion for leave to file affidavit of Harry L. Hulman, Director of Revenue, State of Illinois, dated March 1, 1965, instanter or otherwise; and granting defen- [fol. 211] dant's oral motion of March 2, 1965 for issuance of subpoenas for and the taking of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois, because such Order of the Circuit Court is contrary to the pleadings and the evidence in the cause, is arbitrary, capricious, and an abuse of such Circuit Court's discretion, and contravenes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules; and

13.) A judgment and order remanding this cause to the Circuit Court of Cook County, with directions to vacate and set aside, *in toto*, its Order and Judgment of March 10, 1965, denying defendant's renewed oral motion of March 10, 1965 for issuance of subpoenas for and the taking of the

testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois; denying defendant's motion to strike affidavits in support of plaintiff's motion for summary judgment or, in the alternative, to [fol. 212] deny plaintiff's motion for summary judgment and for the imposition of expenses on plaintiff pursuant to Section 57(5), Illinois Civil Practice Act; granting plaintiff's motion for summary judgment; and entering judgment, for plaintiff and against defendant, in the sum of $93,242.18, and to enter an order in the cause granting defendant's renewed oral motion of March 10, 1965 for issuance of subpoenas for and the taking of the testimony of Harry L. Hulman, Director of Revenue, State of Illinois, of William G. Clark, Attorney General, State of Illinois, and of Mildred Harris, Alice M. Korthauer, and A. C. Sessi, Notaries Public, State of Illinois; granting defendant's motion to strike affidavits in support of plaintiff's motion for summary judgment or, in the alternative, to deny plaintiff's motion for summary judgment and for the imposition of expenses on plaintiff pursuant to Section 57(5), Illinois Civil Practice Act; denying plaintiff's motion for summary judgment; and dismissing the complaint with prejudice and with costs to defendant, because such Order and Judgment of the Circuit Court is contrary to the pleadings and the evidence in the cause, is arbitrary, capricious, and an abuse of such Circuit Court's discretion, and contra- [fol. 213] venes the applicable Illinois statutes, especially, the Illinois Civil Practice Act, and the pertinent Illinois Supreme Court Rules.

Leibman, Williams, Bennett and Baird, By Julian R. Wilheim, Attorneys for Defendant National Bellas Hess, Incorporated, 208 South LaSalle Street, Chicago 4, Illinois, FInancial 6-2200.

Dated, April 7, 1965

[fol. 428]

IN THE SUPREME COURT OF ILLINOIS

Docket No. 39330—Agenda 24—November, 1965.

THE DEPARTMENT OF REVENUE, Appellee,

v.

NATIONAL BELLAS HESS, INC., Appellant.

OPINION—January 25, 1966

Mr. Justice House delivered the opinion of the court:

Defendant National Bellas Hess, Incorporated, a non-resident mail-order vendor, appeals from a summary judgment entered by the circuit court of Cook County against it for the sum of $93,242.18, representing taxes of $74,593.75 assessed under the Illinois Use Tax Act, (Ill. Rev. Stat. 1961, chap. 120, pars. 439.1 *et seq.*,) for the period of July 17, 1961, through October 31, 1962, plus a 25% penalty of $18,648.43. Constitutional questions, as well as the public revenue, are involved.

There is no dispute about the following facts which are gathered from the pleadings. Defendant is a national mail order company. It issues annually two main catalogues, described as "Spring and Summer" and "Fall and Winter," and it also issues during the year a number of intermediate smaller "sales books" or "flyers." The catalogue contains approximately 4000 different items of merchandise for retail sale, and it is mailed to the company's own list of customers. This list, which contained 5,000,000 names when the company acquired it in 1932, is kept current with active and recent customers. The "flyers," which are less costly to distribute, are mailed to a less restricted list of customers or potential customers. They are occasionally mailed in bulk addressed to "occupant" or enclosed in the parcels sent

to customers in filling orders from a prior "flyer" or catalogue.

The company's only plant is located in North Kansas City, Missouri, and all of its mail-order activities occur there, except for purchasing, which is done initially by a wholly owned subsidiary in New York. All of the catalogues and "flyers" are mailed from North Kansas City; orders from customers are received and accepted there; the goods are mailed or shipped by common carrier from there; and payment by the customer is mailed there.

The company is a Delaware corporation and is qualified to do business only in Delaware and Missouri. It does not maintain in Illinois any office, distribution house, sales house, warehouse or any other place of business; it does not have in Illinois any agent, salesman, canvasser, solicitor or other type of representative to sell or take orders, to deliver merchandise, to accept payments, or to service merchandise it sells; it does not own any tangible prop- [fol. 429] erty, real or personal, in Illinois; it has no telephone listing in Illinois and it has not advertised its merchandise for sale in newspapers, on billboards, or by radio or television in Illinois.

Section 3 of the Use Tax Act, which became effective in July, 1955, imposes a tax "upon the privilege of using in this State tangible personal property purchased at retail * * * from a retailer." It also provides that the tax "* * * shall be collected from the purchaser by a retailer maintaining a place of business in this State * * *." (Ill. Rev. Stat. 1961, chap. 120, par. 439.3.) The constitutionality of the act was adjudicated and a determination of its operating incidence was made by this court two years later. (*Turner* v. *Wright*, 11 Ill.2d 161.) Section 2 of the act, which defines various terms used in the act, was amended effective July 17, 1961, (the commencement date of the assessment here in question) by adding a new paragraph to the definition of a "retailer maintaining a place of business in this State." The new paragraph, referred to

as the "catalogue amendment", defines a "retailer maintaining a place of business in this State" as any retailer "Engaging in soliciting orders within this State from users by means of catalogues or other advertising, whether such orders are received or accepted within or without this State." Ill. Rev. Stat. 1963, chap. 120, par. 439.2.

The Use Tax Act was also amended in July, 1961, by adding a new section, section 12a, which provides for substituted service of process on a nonresident falling within the definition of "retailer maintaining a place of business in this State." It provides that, "Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in the State within the meaning of Section 2 of this Act, * * * shall be deemed thereby to appoint the Secretary of State of Illinois his agent for the service of process or notice in any judicial or administrative proceeding under this Act. Such process or notice shall be served by the Department on the Secretary of State by leaving, at the office of the Secretary of State at least 15 days before the return day of such process or notice, a true and certified copy thereof, and by sending to the taxpayer by registered or certified mail, postage prepaid, a like and true certified copy, with an endorsement thereon of the service upon said Secretary of State, addressed to such taxpayer at his last known address." [fol. 430] (Ill. Rev. Stat. 1961, chap. 120, par. 439.12a.) The section provides that this substituted service of process or notice "shall be of the same force and validity as if served upon the taxpayer personally within this State."

While defendant has raised a number of grounds for reversing the judgment entered against it, its two principle arguments are: (1) that the exercise of *in personam* jurisdiction by the circuit court in this proceeding constitutes a denial of due process of law under the Federal and Illinois constitutions, (U.S. Const., Amend. XIV, sec. 1; Ill. Const. art. II, sec. 2,) and (2) that the Use Tax Act in so far as it requires that defendant collect the use tax from Illinois tax-

payers is a denial of due process of law under the Federal and Illinois constitutions and violative of the commerce clause of the Federal constitution. (U.S. Const., art. I, sec. 8, cl. 3.) We consider first the constitutionality of requiring defendant to collect the Illinois use tax.

The Supreme Court has held that a State's power to impose upon a nonresident vendor the burden of collecting its use tax depends upon the amount of activities conducted by the nonresident vendor in the taxing state. (*American Oil Company* v. *Neill*, 380 U.S. 451, 14 L. ed. 2d 1, 85 S. Ct. 1130; *Scripto Inc.* v. *Carson*, 362 U.S. 207, 4 L. ed. 2d 660, 80 S. Ct. 619; *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 98 L. ed. 744, 74 S. Ct. 535; *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 88 L. ed. 1309, 64 S. Ct. 1028.) "There must be * * * 'some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax.'" *Scripto Inc.* v. *Carson*, 362 U.S. 207, 210-211, 4 L. ed. 2d 660, 80 S. Ct. 619, 621.

Nelson v. *Sears Roebuck & Co.*, 312 U.S. 359, 85 L. ed. 888, 61 S. Ct. 586, involved the constitutionality of the Iowa use tax as applied to Sears mail order business conducted directly between customers in Iowa and Sears mail-order houses located outside Iowa. Sears was authorized to do business in Iowa and had retail stores there. The court upheld Iowa's power to impose this collector's liability against Sears on such mail orders against the attack that the exercise of such power denied Sears of due process of law under the fourteenth amendment and violated the commerce clause of section 8 of article I of the constitution.

Nelson v. *Montgomery Ward*, 312 U.S. 373, 85 L. ed. 897, 61 S. Ct. 593, a companion case to *Sears Roebuck*, raised the identical issue on almost the same facts as in [fol. 431] *Sears Roebuck* and the court reached the same result. In the course of this opinion, however, the court stated: "There is a further fact in this record which makes a reversal of this judgment necessary. It was stipulated that 'advertisements have been caused to be printed by the

retail stores of the petitioner [Montgomery Ward & Co.] in the State of Iowa, advertising not only retail merchandise, but the ability to complete service through the use of the catalog.' *This stipulation clearly means that respondent has solicited mail order sales in Iowa.* [Emphasis added.] The fact that that solicitation was done through local advertisements rather than directly by local agents * * * is immaterial. Nor is it material that the orders were filled by direct shipments from points outside the state to purchasers within the state." 312 U.S. 373, 376, 85 L. ed. 897, 899, 61 S. Ct. 593, 595.

The same issue was again raised in *General Trading Co.* v. *State Tax Commission*, 322 U.S. 335, 88 L. ed. 1309, 64 S. Ct. 1028. That case also involved the Iowa use tax, but this time the vendor had never qualified to do business as a foreign corporation in Iowa nor did it maintain any office, branch or warehouse there. Orders were solicited by traveling salesmen sent into Iowa from their Minnesota headquarters. Again, the court upheld Iowa's jurisdiction to impose liability on the nonresident vendor for collection of the use tax on property shipped by common carrier or the post into Iowa.

The question was again raised in *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 98 L. ed. 744, 74 S. Ct. 535. Miller Bros. Co. only made sales directly to its customers in Wilmington, Delaware, and did not take orders by mail or telephone. Maryland's Court of Appeals held Miller Bros. Co. liable for the Maryland use tax on all goods sold in the Delaware store to Maryland residents whether the goods were delivered into Maryland by common carrier, the vendor's truck or carried by the purchasers themselves. The U.S. Supreme Court held that advertising by Miller Bros. Co. with Delaware newspapers and radio stations which reached Maryland residents, its occasional sales circulars which were mailed to all former customers including customers in Maryland, and the occasional delivery of goods into Maryland did not constitute a jurisdictional basis for imposing the burden of collecting or paying the Maryland

use tax on this Delaware vendor. In distinguishing the *General Trading* case the court said, "That was the case of an [fol. 432] out-of-state merchant entering the taxing state through traveling sales agents to conduct continuous local solicitation followed by delivery of ordered goods to the customers * * *. But there is a wide gulf between this type of active and aggressive operation within a taxing state and the occasional delivery of goods sold at an out-of-state store with no solicitation other than the incidental effects of general advertising." 347 U.S. 340, 346-347, 98 L. ed. 744, 749, 74 S. Ct. 535, 540.

The issue again came before the court in *Scripto, Inc.* v. *Carson*, 362 U.S. 207, 4 L. ed. 2d 660, 80 S. Ct. 619. The court held that solicitation by advertising specialty brokers who were not employees or agents of Scripto, the Georgia vendor, constituted a jurisdictional basis for imposing the burden of collecting or paying the Florida use tax on orders solicited by the brokers and filled by shipping the merchandise into Florida. After stating that the case was controlled by *General Trading Co.* the court distinguished the *Miller Bros. Co.* case by saying: "Miller had no solicitors in Maryland; there was no 'exploitation of the consumer market'; no regular, systematic displaying of its products by catalogs, samples or the like. But, on the contrary, the goods on which Maryland sought to force Miller to collect its tax were sold to residents of Maryland when personally present at Miller's store in Delaware. * * * Marylanders went to Delaware to make purchases—Miller did not go to Maryland for sales. Moreover, it was impossible for Miller to determine that goods sold for cash to a customer over the counter at its store in Delaware were to be used and enjoyed in Maryland." 362 U.S. 207, 212, 4 L. ed. 2d 660, 664, 665, 80 S. Ct. 619.

From the foregoing cases it would appear that Mr. Justice Rutledge has gotten to the heart of the "what" and "why" that constitutes a jurisdictional basis for imposing on a nonresident vendor the burden of collecting the use tax on merchandise sold and delivered to residents of the

taxing State. He said: "The old notion that 'mere solicitation' is not 'doing business' when it is regular, continuous and persistent is fast losing its force. In the *General Trading Co.* case it loses force altogether, for the Iowa statute defines this process in terms as 'a retailer maintaining a place of business in this state.' The Iowa Supreme Court sustains the definition and this Court gives effect to its decision in upholding the tax. Fiction the definition may be; but it is fiction with substance because, for every relevant [fol. 433] constitutional consideration affecting taxation of transactions, regular, continuous, persistent solicitation has the same economic, and should have the same legal, consequences as does maintaining an office for soliciting and even contracting purposes or maintaining a place of business, where the goods actually are shipped into the state from without for delivery to the particular buyer." (Separate opinion concurring with *General Trading Company* v. *State Tax Commission* and *International Harvester Co.* v. *Department of Treasury,* 322 U.S. 340, 349, 88 L. ed. 1313, 1319, and dissenting to *McLeod* v. *J. E. Dilworth Co.,* 322 U.S. 327, 349, 354, 88 L. ed. 1304, 1319, 1321.) In short, "continuous local solicitation followed by delivery of ordered goods to the customers" apparently forms a constitutional basis for a "State's decision to regard such a rivalry with its local merchants as equivalent to being a local merchant." *Miller Bros. Co.* v. *State of Maryland,* 347 U.S. 340, 346, 98 L. ed. 744, 749, 74 S. Ct. 535, 540.

We do not think it important that defendant in this case solicits orders by catalogue and flyers rather than by local advertising as in *Montgomery Ward,* or by salesmen as in *General Trading Co.* or by brokers as in *Scripto, Inc.* The important question is whether there is "exploitation of the consumer market" by continuous solicitation and not whether the company used local advertising, salesmen, brokers or catalogues since the vendor will use that type of solicitation which most effectively and economically exploits the consumer market.

We believe the record in this case shows that defendant has engaged in "soliciting orders within this State from users by means of catalogues and other advertising" and that it is, therefore, a "retailer maintaining a place of business in this State" under the Use Tax Act. Since the record also supports the conclusion that there was continuous local solicitation of mail orders followed by delivery of the ordered goods to customers in Illinois, we hold that the Use Tax Act does not deprive defendant of due process of law under the Federal or Illinois constitutions nor does it violate the commerce clause of the Federal constitution.

Defendant argues that the issue here is whether Illinois can impose its use tax on it and that this "issue cannot be obfuscated by gratuitous and euphemistic statements that Illinois is attempting to impose upon defendant only the duty of such tax collection." Section 3 of the Use Tax Act provides that the tax imposed on the purchaser-user is to be collected by the retailer. Section 8 provides that "the tax [fol. 434] herein required to be collected by any retailer pursuant to this Act, and any such tax collected by any retailer shall constitute a debt owed by the retailer to this State * * *." The effect of these two sections is that the tax is to be collected by the retailer; but if he fails to collect the tax, he himself is liable for its payment. The Florida statute under consideration in the *Scripto, Inc.,* case also imposed on the vendor the burden of collecting or paying the use tax. The court stated, "We note that the appellant is charged with no tax—save when, as here, he fails or refuses to collect it from the Florida customer," and went on to affirm the tax liability levied against Scripto, Inc., 362 U.S. at 211.

Defendant's other principal contention for reversing this judgment is that the exercise of *in personam* jurisdiction by the circuit court deprived it of due process of law. Defendant states that in none of the cases dealing with a State use tax and the imposition of collection liability has the issue been raised of whether substituted service of process on a nonresident vendor will give a court jurisdiction to enter an *in personam* judgment.

Thomas Reed Powell raised this issue in "Sales and Use Taxes: Collection from Absentee Vendors." (57 Harv. L. Rev. 1086 (1944).) He analyzed the problem of obtaining personal service on a nonresident vendor who does all his business by mail order or whose soliciting agents have left the State ahead of the process server and concluded that, "Such practical difficulties cannot as yet be minimized by applying to all foreign corporations engaged exclusively in interstate commerce the familiar statutes requiring the appointment of an agent or providing that the doing of business shall itself be a sufficient basis for service of process on a state official in causes of action arising out of business there done." (57 Harv. L. Rev. 1086, 1088.) This conclusion was apparently correct when written, but we note that it was written a year before the land mark case of *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L. ed 95, 66 S. Ct. 154.

In *Gray* v. *American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, we stated, "Under modern doctrine the power of a State court to enter a binding judgment against one not served with process within the State depends upon two questions: first, whether he has certain minimum contacts with the State [citation], and second, whether there has been a reasonable method of notification." (22 Ill.2d 432, 437). We consider first the question of minimum con-
[fol. 435] tacts with the State.

In the use tax cases heretofore considered the court speaks of the State's "jurisdiction or power to create this collector's liability," (See, *e.g.*, *Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 344, 98 L. ed. 744, 748, 74 S. Ct. 535, 538,) and turns the question of such jurisdiction or power on whether the nonresident vendor has "minimum connections" with the taxing State. (*Miller Bros. Co.* v. *State of Maryland*, 347 U.S. 340, 345, 98 L. ed. 744, 748, 74 S. Ct. 535, 539.) Thus, the power to render an *in personam* judgment against one not served with process within the State and the power to impose a collector's liability for the use tax on a nonresident vendor both depend on "mini-

mum contacts" or "minimum connections" with the State. Whether the "minimum connections" which form the basis of jurisdiction to impose the collector's liability are sufficient to form the basis of *in personam* jurisdiction to enforce this liability has not, to our knowledge, been decided by the Supreme Court. It would be an anomalous situation, however, if a State had jurisdiction to impose this collector's liability but did not have jurisdiction to enforce it.

McGee v. *International Life Insurance Co.*, 355 U.S. 220, 2 L. ed. 2d 223, 78 S. Ct. 199, involved an action brought in California against a foreign insurance company on a policy issued to a resident of California. The insurance company did not have any office or agent in California and never solicited or did any insurance business in California apart from the policy involved in the case. The insurance company was not served with process in California, but was notified by registered mail at its place of business in Texas, pursuant to a statute permitting such service in actions on insurance contracts. After referring to the *International Shoe* case and the trend "toward expanding the permissible scope of state jurisdiction over foreign corporations," the court held that "it is sufficient for purposes of due process that the suit was based on a contract which had substantial connection" with California. 355 U.S. 220, 223, 2 L. ed. 2d 223, 226, 78 S. Ct. 199, 201.

Hanson v. *Denckla*, 357 U.S. 235, 2 L. ed. 2d 1283, 78 S. Ct. 1228, concerned the right to $400,000, part of the corpus of a trust established in Delaware by a settlor who later became domiciled in Florida. Delaware refused to accord full faith and credit to a Florida decree adjudicating the matter because the Florida court had not acquired jurisdiction over an indispensable party, the Delaware trustee. [fol. 436] The trustee was not served with process in Florida, but was notified by ordinary mail and notice was published locally as required by the Florida statutes dealing with constructive service.

The court first noted that "the requirements for personal jurisdiction over non-residents have evolved from the rigid rule of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. ed. 565 to the flexible standard of *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 90 L. ed. 2d 95, 66 S. Ct. 154." It then stated, "But it is a mistake to assume that this trend heralds the eventual demise of all restrictions on the personal jurisdiction of state courts. * * * a defendant may not be called upon to do so [defend himself in a foreign tribunal] unless he has had the 'minimal contacts' with that State that are a prerequisite to its exercise of power over him." The court proceeded to distinguish the "minimal contacts" present in the *McGee* case from the absence of "minimal contacts" in this *Hanson* case. "None of the trust assets has ever been held or administered in Florida, and the record discloses *no solicitation of business in that State either in person or by mail.* * * * In *McGee*, the nonresident defendant *solicited* a reinsurance agreement with a resident of California. * * * But the record discloses no instance in which the *trustee* performed any acts in Florida that bear the same relationship to the [trust] agreement as the *solicitation* in *McGee.*" (Emphasis added.) 357 U.S. 234, 251-252, 2 L. ed. 2d 1283, 1296, 78 S. Ct. 1228, 1238-1239.

Thus, solicitation which is of prime importance in satisfying the "minimal connections" requirement in the use tax cases is of equal importance in satisfying the "minimal contacts" requirement necessary for the exercise of *in personam* jurisdiction with substituted service of process. Also significant is the fact that the solicitation, which was so important in the *McGee* case, was by mail. (See also, *Travelers Health Ass'n* v. *Virginia*, 339 U.S. 643, 94 L. ed. 1154, 70 S. Ct. 927.) We hold that defendant's continuous local solicitation for mail orders followed by delivery of the ordered goods to customers in Illinois constitute the "minimal contacts" between defendant and Illinois that are requisite to the exercise of *in personam* jurisdiction over it.

This brings us to the question of whether section 12a provides a reasonable method of notification. The section states that a true and certified copy of the process or notice shall be sent to the taxpayer by registered or certified mail at his last known address. In the *International Shoe Co.* [fol. 437] case the court said, "Nor can we say that the mailing of the notice of suit to appellant by registered mail at its home office was not reasonably calculated to apprise appellant of the suit." (326 U.S. 310, 320, 90 L. ed. 95, 104, 66 S. Ct. 154, 160.) We are of the opinion that section 12a gives the person to be served or notified "a realistic opportunity to appear and be heard." See *Gray* v. *American Radiator and Standard Sanitary Corp.*, 22 Ill.2d 432, 436.

The record shows that on January 21, 1963, a certified copy of the notice of proposed assessment was sent by registered mail addressed to defendant's North Kansas City office. On June 26, 1963, a certified copy of final assessment was sent by registered mail addressed to defendant's North Kansas City office and on January 23, 1964, a certified copy of *alias* summons, with a copy of the complaint attached, was sent by registered mail to defendant's North Kansas City office. Defendant did not respond to the notice of proposed assessment or final assessment, but it did make a special appearance to contest the jurisdiction of the circuit court. There is nothing in the record to show that defendant did not have adequate notice or sufficient time to prepare its defenses and appear.

Defendant also argues that section 12a does not apply to it. To support this argument it first points out that the section states, "Any non-resident of this State who accepts the privilege extended by the laws of this State to non-residents of acting as a retailer maintaining a place of business in this State * * *." Defendant then contends that it receives no privilege from Illinois.

The plain intent and meaning of section 12a is to provide a method of substituted service on a nonresident "acting as a retailer maintaining a place of business in this State within the meaning of Section 2." Whether Illinois extended the

"privilege" or defendant accepted the "privilege" is academic, because, as we have pointed out, defendant is "maintaining a place of business in this State within the meaning of Section 2" and the application of 12a to defendant did not deprive it of due process of law.

Also in support of its argument that section 12a is not applicable to it, defendant points out that the section provides for mailing a copy of the notice or process "to the taxpayer * * * addressed to such taxpayer at his last known address." Since defendant is a collector of the tax rather than a "taxpayer" it concludes that the section does not apply to it.

[fol. 438] As we just pointed out, section 12a provides a method of substituted service on persons who have incurred a liability under the Use Tax Act. The section clearly provides in the first sentence that it is to apply to (1) nonresident vendors, (2) resident vendors who subsequently move from the State or conceal their whereabouts and (3) resident or nonresident users who move from the State or conceal their whereabouts. The section thereafter uses the word "taxpayer" in a generic, and not in a technical, manner to cover all three categories of persons who may have incurred liability under the act and cannot be served with process in the State. The section clearly applies to defendant.

The constitutional issues argued by *amici curiae* are essentially the same as those argued by defendant. They do contend, however, that equal treatment has not been accorded resident and nonresident vendors with regard to their respective liabilities under the Retailers' Occupation Tax Act and the Use Tax Act on credit sales. Since there is nothing in the record concerning credit sales, we need not consider this question. Nor will we consider a memorandum of the Department of Revenue concerning sales for resale and its effect on manufacturers and wholesalers, since there are no sales for resale involved in this case.

The remaining questions raised by defendant can be disposed of summarily. Defendant argues that the complaint

should have been dismissed because the verification was not personally signed by Harry L. Hulman, Director of the Department of Revenue. Verification of the complaint was not necessary. (Ill. Rev. Stat. 1961, chap. 110, par. 35.) It also argues that the trial court erred in entering a summary judgment because there were genuine issues of material fact raised by the pleadings. Defendant does not state what those issues are and our examination of the pleadings does not reveal any such issues. It is also argued that summary judgment should not have been entered because two affidavits of Director Hulman were not personally signed by him and the affidavit of Attorney General William G. Clark consists only of argument and conclusions of law. As we just mentioned, the pleadings do not show any genuine issues of material fact.

For the foregoing reasons, the judgment of the circuit court of Cook County is affirmed.

Judgment affirmed.

[fol. 439]

IN THE SUPREME COURT OF ILLINOIS

No. 39330

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS FOR THE USE OF THE PEOPLE OF THE STATE OF ILLINOIS, Appellee,

vs.

NATIONAL BELLAS HESS, INCORPORATED, Appellant.

Appeal from Circuit Court, Cook County

63 C 21015

ORDER OF AFFIRMANCE—January 25, 1966

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Cook County aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error.

I, Mrs. Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 29th day of March, 1966.

Mrs. Earle Benjamin Searcy, Clerk, Supreme Court of the State of Illinois.

(SEAL)

[fol. 456]

IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—Filed April 22, 1966

I. Notice hereby is given that National Bellas Hess, Incorporated, the defendant-appellant above named, hereby appeals to the Supreme Court of the United States from the final Order and Judgment of the Supreme Court of Illinois affirming the judgment of the Circuit Court of Cook County, Illinois, which is set forth and contained in the Opinion of the Supreme Court of Illinois filed in this cause on January 25, 1966; in the Order of the Supreme Court of Illinois denying defendant-appellant's petition for rehearing filed in this cause on March 23, 1966; and the final process of Mandate issued by the Supreme Court of Illinois in this cause on March 29, 1966.

[fol. 457] This appeal is taken pursuant to the United States Code, Title 28, Section 1257(2).

II. The Clerk will please prepare a transcript of the Record in this cause, for transmission to the Clerk of the Supreme Court of the United States, and include in such transcript the following:

1.) Complaint, filed in the Circuit Court of Cook County, Illinois on October 15, 1963, together with attached Verification, subscribed and sworn on October 11, 1963, and attached unnumbered Exhibits.

2.) Order, entered by the Circuit Court of Cook County, Illinois on December 13, 1963.

3.) Alias Summons, issued by the Circuit Court of Cook County, Illinois on January 8, 1964, together with attached Affidavit of Service, dated January 23, 1964, and attached Return of Service, filed in the Circuit Court of Cook County, Illinois on February 4, 1964.

4.) Order, entered by the Circuit Court of Cook County, Illinois on January 10, 1964.

5.) Unnumbered Exhibits to Complaint, filed in the Circuit Court of Cook County, Illinois on January 10, 1964.

6.) Notice and Special Appearance and Motion to Vacate and Set Aside Order Entered January 10, 1964, filed in the [fol. 458] Circuit Court of Cook County, Illinois on January 29, 1964.

7.) Order, entered by the Circuit Court of Cook County, Illinois on January 31, 1964.

8.) Notice and Special Appearance and Motion to Set Aside and Quash Service of Alias Summons, or, Alternatively, to Set Aside and Quash Alias Summons, and Dismiss Complaint, together with attached Affidavits, filed in the Circuit Court of Cook County, Illinois on March 24, 1964.

9.) Transcript of Proceedings of May 6, 1964 in the Circuit Court of Cook County, Illinois.

10.) Order, entered by the Circuit Court of Cook County, Illinois on May 20, 1964.

11.) Appearance, filed in the Circuit Court of Cook County, Illinois on June 19, 1964.

12.) Notice and Motion of Defendant National Bellas Hess, Incorporated to Strike or Dismiss Complaint, filed in the Circuit Court of Cook County, Illinois on June 23, 1964.

13.) Order, entered by the Circuit Court of Cook County, Illinois on June 23, 1964.

14.) Answer to Complaint, filed in the Circuit Court of Cook County, Illinois on July 22, 1964.

[fol. 459] 15.) Notice of Motion, filed in the Circuit Court of Cook County, Illinois on September 14, 1964.

16.) Order, entered by the Circuit Court of Cook County, Illinois on September 21, 1964.

17.) Notice of Deposition, served on November 30, 1964 and filed in the Circuit Court of Cook County, Illinois on February 9, 1965.

18.) Notice of Motion and Motion, together with attached Affidavit, filed in the Circuit Court of Cook County, Illinois on December 15, 1964.

19.) Order, entered by the Circuit Court of Cook County, Illinois on December 15, 1964.

20.) Transcript of Proceedings of January 25, 1965 in the Circuit Court of Cook County, Illinois.

21.) Affidavit, filed in the Circuit Court of Cook County, Illinois on January 25, 1965.

22.) Order, entered by the Circuit Court of Cook County, Illinois on January 27, 1965.

23.) Transcript of Proceedings of February 5, 1965 in the Circuit Court of Cook County, Illinois.

[fol. 460] 24.) Order, entered by the Circuit Court of Cook County, Illinois on February 5, 1965 (#1).

25.) Order, entered by the Circuit Court of Cook County, Illinois on February 5, 1965 (#2).

26.) Transcript of Proceedings of February 16, 1965 in the Circuit Court of Cook County, Illinois.

27.) Order, entered by the Circuit Court of Cook County, Illinois on February 16, 1965.

28.) Affidavit, filed in the Circuit Court of Cook County, Illinois on February 16, 1965.

29.) Notice of Motion and Defendant's Motion to Strike Plaintiff's Affidavits in Support of Plaintiff's Motion for Summary Judgment or, in the Alternative, to Deny Plaintiff's Motion for Summary Judgment and for the Imposition of Expenses on Plaintiff Pursuant to Section 57(5), Illinois Civil Practice Act, filed in the Circuit Court of Cook County, Illinois on February 23, 1965.

30.) Notice of Motion and Defendant's Motion to Strike and Dismiss Alleged Verified Complaint, filed in the Circuit Court of Cook County on March 2, 1965.

31.) Notice of Motion and Motion, together with attached Affidavit and attached Unnumbered Exhibits, filed in the Circuit Court of Cook County, Illinois on March 2, 1965.

[fol. 461] 32.) Transcript of Proceedings of March 2, 1965 in the Circuit Court of Cook County, Illinois.

33.) Order, entered by the Circuit Court of Cook County, Illinois on March 2, 1965.

34.) Affidavits of Merits, filed in the Circuit Court of Cook County, Illinois on March 2, 1965.

35.) Transcript of Proceedings of March 10, 1965 in the Circuit Court of Cook County, Illinois.

36.) Order, entered by the Circuit Court of Cook County, Illinois on March 10, 1965.

37.) Order and Judgment, entered by the Circuit Court of Cook County, Illinois on March 10, 1965.

38.) Notice of Appeal, filed in the Circuit Court of Cook County, Illinois on April 7, 1965.

39.) Opinion, filed by the Supreme Court of Illinois on January 25, 1966.

40.) Notice of Motion and Defendant-Appellant's Motion for Extension of Time to File Petition for Rehearing, together with attached Affidavit, filed in the Supreme Court of Illinois on February 9, 1965.

41.) Order, entered by the Supreme Court of Illinois on February 9, 1966.

[fol. 462] 42.) Petition for Rehearing, filed in the Supreme Court of Illinois on February 14, 1966.

43.) Order, entered by the Supreme Court of Illinois on March 23, 1966.

44.) Mandate, issued by the Supreme Court of Illinois on March 29, 1966.

45.) This Notice of Appeal to the Supreme Court of the United States, filed in the Supreme Court of Illinois.

III. The following questions are presented by this appeal:

1.) Whether the provisions of the Illinois Use Tax Act, as amended (Illinois Revised Statutes [1965], Chapter 120, Sections 439.1 *et seq.*) and the provisions of the Illinois Retailers' Occupation Tax Act, as amended (Illinois Revised Statutes [1965], Chapter 120, Sections 440 *et seq.*) designated in such Use Tax Act, which impose liability upon sellers for collection and payment of Illinois use taxes payable by users, whether or not such use taxes have been collected or are collectible by such sellers, are unconstitutional, insofar as they are construed to be applicable and are applied to defendant-appellant, a non-resident seller which has no place of business, no property, no agents, no inde- [fol. 463] pendent contractors, and no other representatives in Illinois and whose only contact with Illinois arises from engaging in interstate commerce by use of the United States mails for sending mail order catalogues into the several States and by shipping, in response to interstate orders, goods to Illinois users from out of Illinois via the United States mails or interstate common carrier, because:

(A) The imposition of such liability under the Illinois Use Tax Act on such non-resident seller imposes an unreasonable burden on interstate commerce in violation of Article I, Section 8, Clause 3, of the Constitution of the United States;

(B) The imposition of such liability under the Illinois Use Tax Act on such non-resident seller deprives such seller of its property without due process of law in violation of Amendment XIV, Section 1, of the Constitution of the United States; and

(C) The exercise of *in personam* jurisdiction by Illinois over such non-resident seller, by means of out-of-state service of process via the United States mail, in order to impose such liability under the Illinois Use Tax Act on such [fol. 464] seller, deprives such seller of its property without due process of law in violation of Amendment XIV, Section 1, of the Constitution of the United States.

Leibman, Williams, Bennett and Baird, By: Julian R. Wilheim, Attorneys for Defendant-Appellant National Bellas Hess, Incorporated, 208 South LaSalle Street, Chicago, Illinois 60604, FInancial 6-2200.

Dated: April 21, 1966

[fol. 465] Certificate of Service (omitted in printing).

[fol. 467] Clerk's Certificate (omitted in printing).

[fol. 468]

SUPREME COURT OF THE UNITED STATES

No. 241—October Term, 1966

NATIONAL BELLAS HESS, INCORPORATED, Appellant,

v.

DEPARTMENT OF REVENUE OF THE STATE OF ILLINOIS, ETC.

Appeal from the Supreme Court of the State of Illinois.

ORDER NOTING PROBABLE JURISDICTION—October 10, 1966

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

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